

# **Risk-based Approach to Corporate Human Rights Responsibility**

*Moving the Business and Human Rights Agenda Forward?*

**Katja Khardikova**



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*Centre for Development and the Environment  
University of Oslo  
Blindern, Norway*

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## **Abstract**

The United Nations Guiding Principles on business and human rights, unanimously endorsed by the UN Human Rights Council in 2011 represent a watershed in the business and human rights debate. The Guiding Principles are based on differentiated but complementary responsibilities: the state duty to protect human rights and corporate responsibility to respect human rights. The proposed mechanism of human rights due diligence, which is intended to help companies discharge their responsibility to respect human right is largely based on risk assessment and management. This thesis is an in-depth study of the concept of risk in the context of the UN Guiding Principles. I argue that the concept of risk is central in John Ruggie's approach of principled pragmatism, which implies striking a balance between the feasibility and the effectiveness of the Guiding Principles. The risk-based approach to corporate human rights responsibility, being relevant for business, has played a key role in reaching the consensus on the UN Guiding Principles. The human rights due diligence, if widely implemented by companies will broaden the concept of risk in business, shifting the focus of risk management from being primarily on shareholders to all stakeholders. Moreover, the risk-based approach is important for promoting the implementation of the Guiding Principles by companies as the link between human rights risks and business risks and the self-interest of business in risk management, constitutes the business case for human rights due diligence.

**Key words:** UN Guiding Principles, business, human rights, corporate human rights responsibility, stakeholder, human rights impact, risk, due diligence.

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# Abbreviations

ATCA	Alien Tort Claim Act
BHRR	Business Human Rights Responsibility
BIAC	Business and Industry Advisory Committee (OECD)
CCC	Clean Clothes Campaign
COSO	The Committee of Sponsoring Organizations of the Treadway Commission
CSR	Corporate Social Responsibility
DNV	Det Norske Veritas
DRC	Democratic Republic of Congo
ESG	Environmental, Social and Corporate Governance (issues)
ESIA	Environmental and Social Impact Assessment
EU	European Union
FNO	Finansnæringens fellesorganisasjon (Finance Norway)
GPFG	Norwegian Government Pension Fund Global
HRIA	Human Rights Impact Assessment
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFC	International Finance Corporation (World Bank Group)
ILO	International Labour Organization
IOE	International Organisation of Employers
IRM	Institute of Risk Management
ISO	International Organization for Standardization
MNE	Multinational Enterprise
MOSOP	Movement for the Survival of the Ogoni People
NCP	National Contact Point (OECD)
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
PRI	Principles for Responsible Investment
SME	Small- and medium-sized enterprise



SRS	Special Representative of the UN Secretary General
TNC	Transnational corporation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNCTC	United Nations Centre on Transnational Corporations
UNHRC	United Nations Human Rights Council

*Dedicated to the memory of Sir Geoffrey Chandler (1922-2011),  
a pioneer of corporate human rights responsibility, whose legacy lives on  
through the UN Guiding Principles on business and human rights.*

# 1 Introduction

*The greatest risk is the risk of inaction.<sup>1</sup>*

United Nations Guiding Principles on business and human rights (the UN Guiding Principles) represent a watershed in the business and human rights debate. Since 2008, following decades of failed UN efforts in adopting international norms for corporate behaviour with regard to human rights, the UN Human Rights Council (UNHRC) has unanimously endorsed the UN Framework “Protect, Respect and Remedy” and the UN Guiding Principles operationalising the UN Framework. The three pillars of the UN Guiding Principles, the state duty to protect human rights, the corporate responsibility to respect human rights and the access to remedy for victims of corporate human rights abuses, are founded on a careful balance between the respective duties and responsibilities of governments and businesses.

The present study focuses on the second pillar. According to the UNHRC corporate responsibility to respect human rights means that companies “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved” (UNHRC 2011a: 13). In order to avoid adverse impacts on human rights of stakeholders, companies are increasingly expected to adopt policies and implement appropriate processes in order to ensure that they ‘do no harm’. To guide companies towards this goal, the UN Guiding Principles introduce the concept of human rights due diligence, “a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it” (UNHRC 2008a: 9). The concept of risk is at the core of corporate responsibility to respect human rights. This thesis examines the concept of risk in the context of the UN Guiding Principles. The aim is to contribute to better understanding of the concept when applied to human rights

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<sup>1</sup> Idar Kreutzer, managing director of Finance Norway (FNO) and former chief executive officer of Storebrand; quote from the CSR Conference 2012, Oslo, 14 November 2012.

and business and discuss some potentials and challenges of the risk-based approach in promoting corporate responsibility to respect human rights.

## 1.1 Research Question and Central Concepts

The research question for this thesis is:

*How is the concept of risk applied in the UN Guiding Principles, and why was the risk-based approach to corporate human rights responsibility adopted?*

The research question is twofold. First, I analyse how the concept of risk is applied in the UN Guiding Principles in order to get in-depth understanding of its meaning in the context of human rights and business. There is no general and commonly accepted definition of risk. The UN Guiding Principles distinguish between *human rights risks to stakeholders* and *business risks*. Human rights risks are defined as “the business enterprise’s potential adverse human rights impacts” (UNHRC 2011a: 16), i.e. human rights violations that have not yet occurred, but might occur as a direct or indirect consequence of a company’s operations and decisions. Business risks may be understood as any uncertainty about outcomes of a company’s actions and their effects on the business objectives.<sup>2</sup>

Stakeholder theorist R. Edward Freeman defines *stakeholders* as “any group or individual that can affect or be affected by the realization of an organization’s purpose” (Freeman *et al.* 2010: 26). With regard to the UN Framework and the Guiding Principles the term stakeholder has two meanings. There are stakeholders of the UN process for creating global norms for business and human rights. Among these stakeholders are governments, business associations, employers’ organisations, trade unions, non-governmental organisations (NGOs), advocacy groups and representatives of the media and academia, who had an opportunity to participate in consultations and have their say on the development of the UN Framework and the Guiding Principles. In the second meaning, which is the most central

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<sup>2</sup> Based on Spedding and Rose (2008: 11).

here, the term stakeholder refers to those groups that have a “stake in or a claim on the firm” (Freeman 2002: 39).

Answering the second part of the research question on why the risk-based approach to corporate human rights responsibility was adopted, I examined the UN process leading up to the UN Guiding Principles, focusing on what role the risk-based approach plays in promoting adoption and implementation of the UN Guiding Principles.

## **1.2 Contextual Background**

### **1.2.1 Towards the UN Guiding Principles on Business and Human Rights**

Regulation of societal impacts of transnational corporations has for a long period of time been on the agenda of the UN. After a debate that began late in the 1960's (Koenig-Archibugi 2004: 247), the UN established in 1974 the United Nations Centre on Transnational Corporations (UNCTC) that between 1974 and 1992 conducted the Programme on Transnational Corporations (UNCTAD 2002). In 1978 a draft code of conduct for TNCs was presented for the first time, and later revised, but it was never formally adopted (Koenig-Archibugi 2004: 247). The 1990s are considered to be a turning point in the work on business and human rights norms. One of the main reasons was that the rapid expansion of oil, gas and mining industries into areas with difficult political and economic contexts, and the practice of outsourcing production in apparel and footwear industry revealed poor working conditions in global supply chains (UN 2010). The UN Commission on Human Rights<sup>3</sup> (UNCHR) launched a project in order to develop a normative framework for business and human rights that resulted in the “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (UN Draft Norms) (UNCHR 2003). It was thought to become the first legally binding international framework for companies with regard to

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<sup>3</sup> The forerunner of the UN Human Rights Council.

their human rights impacts. Various human rights advocacy groups were in favour of the UN Draft Norms. Many business actors, on the contrary were against the UN Draft Norms because they would impose nearly the same amount of responsibility on companies as governments have for protection and fulfilment of human rights (UN 2010, UNHRC 2011a: 3). In 2004 the Commission rejected the UN Draft Norms on the ground that they had no legal standing (ECOSOC 2004, UNCHR 2006: 14).

Despite the failure of the UN Draft Norms, the Commission continued its work on business and human rights and requested the Secretary-General, then Kofi Annan, to appoint a Special Representative to work on this issue (UNCHR 2005: 1). John Ruggie, the founding father of the UN Global Compact and a Harvard University professor, was in July 2005 appointed as Special Representative of the UN Secretary-General on human rights and transnational corporations and other business enterprises (SRSG). The resolution containing his mandate requested among other things to “identify and clarify standards of corporate responsibility and accountability,” “develop materials and methodologies for undertaking human rights impact assessments” and “compile a compendium of best practices” (ibid.).

The result of this mandate was the report containing the UN Framework “Protect, Respect and Remedy” unanimously endorsed by the UNHRC in 2008 (UNHRC 2008a). Ruggie writes that the endorsement of the UN Framework “marked the first time the Council or its predecessor, the Commission, had taken a policy position on business and human rights” (Ruggie 2009). SRSG finds that one of the reasons why it was difficult to make progress in the area of human rights and business was “the lack of an authoritative focal point around which actors’ expectations could converge—a framework that clarified the relevant actors’ responsibilities, and provided the foundation on which thinking and action could build over time” (UN 2010). The UN Framework is thought to constitute such an authoritative focal point. It is a conceptual and policy framework based on three interconnected pillars: the *state duty to protect* human rights against abuses by third parties, including

businesses, the *corporate responsibility to respect* human rights, and the *access to remedy* for victims of business-related human rights abuses. Duties of states and responsibilities of business are differentiated but complementary (UNHRC 2008a: 4).

Corporate responsibility to respect human rights as set forth in the UN Framework represents a “global standard of expected conduct” for companies (UN 2010). Businesses are *expected* to adhere to this standard and respect all internationally recognised human rights not only in their operations but also in relationships with other actors, e.g. public authorities and suppliers. This responsibility to respect exists for all companies also when operating in states, which have not ratified all the relevant for human rights covenants and conventions.

In 2008, the mandate was extended for three more years, in order for the SRSG to operationalise and promote the UN Framework. Among other tasks, the UNHRC requested to “elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders” (UNHRC 2008d: 3). The UN Guiding Principles, endorsed by the UNHRC in June 2011 explain the practical implications of implementing the UN Framework in practice and give general recommendations to states and companies.

Both mandates explicitly requested the SRSG to conduct his work in consultative and transparent manner. Therefore, between 2005 and 2011 John Ruggie and his team carried out extensive research on existing practices and standards, conducted 47 consultation meetings with key stakeholders from all continents, received numerous written submissions and countless commentaries (UNHRC 2011a: 4-5). Based on the consultative approach with broad participation of various actors, e.g. NGOs, companies, employer and business associations, and states, the UN Guiding Principles are considered to reflect a common ground or a shared understanding of what corporate human

rights responsibility is. In spite of some critical statements,<sup>4</sup> the work of the SRSG has been widely acknowledged and welcomed by various actors, states, business associations, civil society, international organisations and global governance initiatives.<sup>5</sup>

Ruggie stresses that the UN Guiding Principles are not yet another set of voluntary standards, but “authoritative UN standards around which the articulated expectations of many public and private institutions have already converged” (Ruggie 2011b). Although, the UN Framework and the Guiding Principles are not legally binding, they can be seen as soft law. They are thought to complement already existing initiatives and standards. Elaborated on the basis of an extensive study of international guidelines and multi-stakeholder initiatives, the UN Framework and the Guiding Principles aim at creating a greater coherence in the field of business and human rights (UNHRC 2011a: 5).

The endorsement of the UN Guiding Principles in 2011 concluded the second mandate of the SRSG. This is an important but only a first step in creating an effective global standard for corporate human rights responsibility. The road ahead lies through effective implementation of the Guiding Principles in practice. To guide this process, the UNHRC has established a Working Group on the issue of human rights and transnational corporations and other business enterprises (Working Group). The Working Group consists of five independent experts<sup>6</sup> appointed in September 2011. The core tasks of the Working Group are to promote and disseminate the UN Guiding Principles, conduct country visits, provide practical guidance and tools to states, business and civil society, support capacity building, and continue the

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<sup>4</sup> Mainly coming from NGOs demanding monitoring of TNCs and legal accountability mechanisms (see for instance the joint statement by FIAN International and 27 other NGOs (FIAN International et al. 2011)).

<sup>5</sup> This inference is based on my impression after reviewing commentaries and submissions to the SRSG Ruggie during his work, and his own statements (see SRSG Portal (2012)).

<sup>6</sup> The five experts are members from various regional groups in the UNHRC: African states – Mr. Daniel Bradlow, Asian states – Mr. Puvan Selvanathan, Eastern European states – Mr. Pavel Sulyandziga, Latin American and Caribbean states – Ms. Alexandra Guaqueta, Western European and other states – Ms. Margaret Jungk (UNHRC 2011b).



consultative approach established by John Ruggie (UNHRC 2011b, OHCHR 2012).

### **1.2.2 The Business and Human Rights Nexus**

Ruggie stresses that business can potentially have an impact on all human rights (UNHRC 2008a: 4). Forsythe (2006: 3) defines international human rights as “fundamental moral rights of the person that are necessary for a life with human dignity.” Applicable to all countries and promoted by the UN, human rights are by many viewed as universal high priority norms.<sup>7</sup> To exist they are not dependent on recognition by all states or on legal enforcement at the national level (Nickel 2007: 35). The minimum human rights standards are the Bill of Human Rights, which contains the Universal Declaration of Human Rights (UDHR), the Covenant on Civil and Political Rights (ICCPR 1966), and the Covenant on Economic, Social and Cultural Rights (ICESCR 1966), and the International Labour Organization’s (ILO) Declaration on Fundamental Principles and Rights at Work (ILO 2012) including the 8 core conventions<sup>8</sup> (UNHRC 2008a: 17). Other conventions might also be applicable, for instance, those addressing rights of vulnerable groups, e.g. children, women, disabled persons, migrant workers and indigenous peoples.<sup>9</sup> Moreover, the Guiding Principles also address the right to development.<sup>10</sup>

The Guiding Principles should cover all internationally recognised human rights. Based on a study of 320 cases of alleged corporate human rights

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<sup>7</sup> However, there is a debate on the issue of universality of international human rights norms, but this discussion lies outside the scope of this thesis. For an overview see, for instance, Donnelly (2003).

<sup>8</sup> The core ILO conventions are: Forced Labour Convention (1930), Freedom of Association and Protection of the Right to Organise Convention (1948), Right to Organise and Collective Bargaining Convention (1949), Equal Remuneration Convention (1951), Abolition of Forced Labour Convention (1957), Discrimination (Employment and Occupation) Convention (1958), Minimum Age Convention (1973) and Worst Forms of Child Labour Convention (1999) (ILO 2003).

<sup>9</sup> These conventions are: Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Declaration on the Rights of Indigenous Peoples, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (OHCHR 2011a: 12).

<sup>10</sup> The Declaration on the Right to Development can be found by following this link: <http://www2.ohchr.org/english/law/rtd.htm>.

violations, the UN Framework suggests some examples of human rights that are especially relevant for businesses (ibid.: 15-16). Among them are such labour rights as right to work, right to non-discrimination, freedom of association, right to just and favourable remuneration, right to a safe working environment, and abolition of slavery, of forced labour and of child labour. Non-labour rights, which are particularly relevant for business include right to life, liberty and security of person, freedom from torture or cruel, inhuman or degrading treatment, right to adequate standard of living, right to education, freedom of movement and right to social security, to name only a few fundamental rights.

The UN Framework stresses that the root cause of wrongful acts of companies with regard to human rights is in the governance gaps created by globalisation (ibid.: 3). This does not imply that globalisation has only negative impacts on human rights. On the contrary, it has contributed to poverty reduction in many emerging market economies and overall welfare in the industrialised world (UNHRC 2007a: 3). However, examples of negative impacts are many, including widespread practices of forced labour and inhuman working conditions in sweatshops in the apparel industry, displacement of indigenous peoples due to mining projects, and companies' involvement in human rights abuses by armed forces employed for protection of the business operations. Such adverse impacts are negative externalities, i.e. costs of an economic activity, which are not reflected in company's prices, but borne by stakeholders against their will.

Protection, promotion and fulfilment of human and labour rights have traditionally been the responsibility of governments. However, the UDHR does not only appeal to the states, but also to all individuals and every organ of the society, that "shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance" (UDHR 1948, preamble). Muchlinski argues that this means that also companies have corporate human rights responsibility based on their

“social existence” (Muchlinski 2003: 39). Business entities have been recognised as “specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights” (UNHRC 2011a: 6). Still, the international human rights law is legally binding only for states, and companies’ obligations under the international law are indirect. In those countries where international human rights norms have been integrated in the national legislation, businesses are obliged to comply with them. However, the degree of integration and, not least, of enforcement vary from one country to another.

Large evidence of business related human rights harm, suggests that many states fail to protect human rights from being adversely impacted by corporate actors.<sup>11</sup> Host states may lack institutional capacity or will to enforce national regulations and the international law, and the challenges are greatest in countries with armed conflicts. Home states are reluctant to regulate extraterritorial activities of ‘their’ TNCs, for instance, due to competitiveness concerns or based on the principles of non-intervention in sovereign states’ internal affairs (UNHRC 2008a: 6-7). Moreover, the complex structures of TNCs make it difficult to hold corporations legally accountable for human rights abuses caused by subsidiaries. However, business actors themselves increasingly recognise that companies “have the same responsibilities in weak governance zones as they do elsewhere” and “are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent” (IOE, ICC and BIAC 2006: §15).<sup>12</sup>

Businesses are increasingly expected to respect international human rights law. This is reflected, not least, in the proliferation of voluntary guidelines on corporate human rights responsibility. Among the most prominent ones are the UN Global Compact, the Organization for Economic

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<sup>11</sup> See for instance materials compiled by the Business and Human Rights Resource Centre (BHRRRC 2012a).

<sup>12</sup> Joint submission to the SRSB by the International Organisation of Employers (IOE), International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee (BIAC) to the Organisation for Economic Co-operation and Development (OECD), “Business and Human Rights: The Role of Government in Weak Governance Zones” (IOE, ICC and BIAC 2006).

Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the Voluntary Principles on Security and Human Rights, and the International Finance Corporation's (IFC)<sup>13</sup> Performance Standards. The importance of these initiatives is not to be underestimated, but the lack of a coherent set of global principles has been a challenge for business as well as for states and civil society. First with the UN Framework and the Guiding Principles the international community has reached a consensus on a set of global norms for business and human rights.

### 1.2.3 The Principled Pragmatism Approach

The progress in the previously stalled debate on business and human rights is largely attributed to the principled pragmatism approach taken by John Ruggie. His strategy implied striking a balance between: the overall aim of effectively protecting human rights of stakeholders from business-related harm; and the understanding of what is feasible to achieve today. In his own words, the principled pragmatism approach

is driven by principle, the *principle* that we need to strengthen the human rights regime to better respond to corporate-related human rights challenges and respond more effectively to the needs of victims. But it is utterly *pragmatic* in how to get from here to there. The determinant for choosing alternative paths is which ones provide the best mix of effectiveness and feasibility. (Ruggie 2008, emphasis added)

The balance between feasibility and effectiveness is important for understanding the UN Guiding Principles and the risk-based approach to corporate human rights responsibility. The Guiding Principles are developed based on the understanding of what is possible to get businesses and governments to accept and adopt already today. To ensure the effectiveness of the UN Guiding Principles in practice, a tremendous work still needs to be

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<sup>13</sup> IFC is a member of the World Bank Group.

done in terms of disseminating and encouraging wide implementation; providing necessary guidance and tools; empowering stakeholders; enhancing accountability; and raising social expectations towards business conduct with regard human rights.

### **1.3 Research Purpose and Relevance**

This thesis is a study of the concept of risk in the UN Guiding Principles. The goal of the research is to contribute to better understanding of the concept when applied to human rights and business and discuss some potentials and challenges of the risk-based approach in promoting corporate responsibility to respect human rights. As the UN Guiding Principles were endorsed in June 2011, the academic contributions on this topic are still scarce. Moreover, recent literature on human rights and business does not give much attention to the concept of risk, although it is central to the proposed human rights due diligence, and is at the core of corporate responsibility to respect human rights. In this research I address this gap and aim at contributing to a debate on the concept of risk in the UN Guiding Principles. This research is also relevant because the field of business and human rights is rapidly evolving, and the interest both on the part of companies, civil society and states is increasing.

### **1.4 Methodology and Theoretical Framework**

This research project does not fit into one single academic discipline. The reason is that the complex issue of business and human rights transcends the disciplinary borders, and analysing it from a point of view of one discipline, such as political science, economics or law would be too narrow. This study is guided by my experience from a number of disciplinary fields, including economics, history, international politics and international law, and the interdisciplinary studies in sustainable development and Corporate Social Responsibility (CSR).

Answering the question of *how* the concept of risk is applied in the Guiding Principles and *why* the risk-based approach to corporate human rights responsibility was adopted, the aim is to contribute to in-depth understanding of the concept of risk in the context of the UN Guiding Principles. Qualitative research design is particularly useful for inquiries where the context, the whole, is important for understanding a particular phenomenon. Moreover, qualitative approach allows an evolving research design (Robson 2002: 166). This is especially appropriate for the present research being an exploratory inquiry concerned with recent developments, which have not yet been extensively researched.

Methods for data collection reflect the qualitative research approach. The main source of data was the UN documents prepared throughout the SRSG's mandate. Six years of extensive research by John Ruggie and his team resulted in a great amount of reports that give a contextual account of the UN process in developing the Guiding Principles. Numerous comments and submissions by stakeholders also contain important information about the perspectives of different stakeholders. In addition to a document review, five in-depth interviews with key informants among UN officials and human rights and risk experts were conducted. Data from the document analysis and the interviews were complemented by an observation of the first meeting of the Working Group with stakeholders in January 2012. As characteristic for qualitative research, the main focus of the fieldwork was on participants' views and perceptions of the concept of risk and its role in the UN Guiding Principles.

With regard to the theoretical framework, this inquiry is informed by the theoretical underpinnings of CSR, in particular the shareholder value theory and the stakeholder theory, which are often contrasted with each other. As will be discussed in chapter 3, precisely this contrast is useful in order to better understand the core issues of the UN Guiding Principles and the risk-based approach.

## **1.5 Scope and Limitations of the Research**

The present research looks at the second pillar of the UN Guiding Principles – the corporate responsibility to respect human rights. However, TNCs operate in political and social context of their host states and are affected by actions (or inactions) of governments. Therefore it is important to take this broader context into account, but limited space and time available for this study preclude a thorough discussion of the role of states in promoting corporate human rights responsibility. This could be worthwhile a separate research project. As the UN Guiding Principles state that the responsibility to respect exists independently of what states do (UNHRC 2011a: 13), I assume that it is possible to analyse the second pillar separately while keeping in mind the broader context.

Nor will the third pillar on the access to remedies be discussed in this thesis due to limited space. However, it is worth noting its importance for the process of implementation of the UN Guiding Principles. The third pillar promotes establishment of grievance mechanisms for victims of corporate human rights abuses. These mechanisms could be both judicial and non-judicial and exist on national and international level. In addition, non-judicial grievance mechanisms may be established at the company level. Grievance mechanisms can be seen as important source of information input to risk assessment, and I will therefore address the third pillar in this limited but most relevant for this study sense.

This thesis is not a study of corporate practices of human rights risk assessment and management. This could be a yet another research project. My aim is to analyse the concept of risk as it is applied in the UN Guiding Principles. Therefore, the main focus is on the UN process.

## **1.6 Structure of the Thesis**

In the following chapter I present the methodological approach of this research project. In chapter 3 I propose a theoretical framework for this study drawing

on CSR literature. Chapter 4 discusses first some challenges of risk assessment in general before examining how the concept of risk is applied in the UN Guiding Principles and how the risk-based approach emerged throughout the mandate of John Ruggie. In chapter 5 I analyse why the risk-based approach was adopted in the Guiding Principles and what it means for promoting corporate human rights responsibility. Furthermore, I discuss the remaining challenges identified during this study. The concluding chapter summarises the discussion and offers further reflections on the risk-based approach to corporate human rights responsibility.



## 2 Methodological Approach

This research is based on a qualitative research strategy and inductive approach. Qualitative research design is particularly useful for exploratory inquiries, thick description and in-depth insight into a research problem (Creswell 2009: 18). This is what this study aims at with regard to the concept of risk and the risk-based approach in the UN Guiding Principles. Moreover, this study is based on the inductive approach, which means that I started with an observation with the aim of detecting patterns and deriving a hypothesis.

### 2.1 Qualitative Research Design

There is no consensus on how a qualitative research strategy should look like. Qualitative research design may take on a number of different forms.<sup>14</sup> However, the qualitative methodological approach has some central characteristics. Creswell identifies a number of them: theoretical lens, holistic account, natural setting, emergent design, interpretive nature, researcher as key instrument, multiple sources of data, inductive data analysis and importance of the participants' perceptions of issues at stake (ibid.: 175-6). The first four elements are addressed in remainder of this section, while the latter five are discussed in the subsequent sections.

First, in this thesis the theoretical approach was not the starting point. Rather, the understanding that CSR theories were relevant for this study emerged gradually during the preliminary research phase. The shareholder value theory and stakeholder theory are used as a lens and a conceptual framework. As will be discussed in chapters 3 and 5, the two theories are competing paradigms, and the UN Guiding Principles aim at shifting the paradigm from the traditional shareholder value approach to a broader stakeholder interest approach in order to ensure that companies pay due attention to their human rights impacts. Second, in this thesis I aim at giving a

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<sup>14</sup> See for instance Denzin and Lincoln (2011), Creswell (2009) and Robson (2002).

holistic account of the concept of risk in the Guiding Principles and the reasons for its adoption. This means that I as far as possible have assessed different perspectives on the issues at stake. Under the literature review, during the fieldwork and in the writing process I was constantly looking for conflicting views and seeking to highlight different perceptions.

In giving a thick description and providing in-depth insight on a social issue, the context is crucial. Understanding the context, in which the UN Guiding Principles emerged, was the key to answering the question of why the risk-based approach to corporate human rights responsibility was adopted. The concept of risk in corporate human rights responsibility emerged in the context of the consultative process conducted by the SRSG John Ruggie. Moreover, the history of the business and human rights debate, the way the UN process evolved and the actors involved help to understand why the notion of risk found its way into the UN Guiding Principles and how it is understood by the stakeholders.

Third, qualitative research takes place in real world settings, and is, according to Creswell naturalistic. The research design is helpful to define the initial focus of the study and the objects for observations, and to formulate initial questions for the interview guide. However, as emphasised by Patton, “the naturalistic and inductive nature of the inquiry makes it both impossible and inappropriate to specify operational variables, state testable hypotheses, or finalize either instrumentation or sampling schemes” (Patton 2002: 44). As mentioned, in this study I started with observation through initial document review and sought to detect patterns. A qualitative research design emerges during the fieldwork.

The emergent design is the fourth among Creswell’s nine elements of the qualitative research strategy. The process of defining the research question, finding useful theoretical perspective and deciding on appropriate methods for data collection was not a linear process. As my understanding of the topic improved during the research process I was able to further narrow down the scope of the research, adjust the research question and refine the research

design. Being open to adjustments and flexible was important for this research, not least because of to the rapid developments in the field of business and human rights, which took place throughout this study. New issues and actors emerged along the way, and new clarifications were offered by the Working Group and the OHCHR during the research period.

## **2.2 Researcher as Interpreter**

Another important characteristic of a qualitative study is its interpretive nature.

[...] we emphasize placing an interpreter in the field to observe the workings of the case, one who records objectively what is happening but simultaneously examines its meaning and redirects observation to refine or substantiate those meanings. (Stake 1995: 8-9)

The researcher is viewed as a key instrument, as the interpreter (Robson 2002: 172). This requires a number of skills such as: asking relevant questions, listening, adaptability and flexibility, good understanding of the issues and lack of bias (ibid.: 167-169). I have already addressed briefly the first four points in this chapter. I will now look closer at the issue of bias.

In my opinion, what is important is not to eliminate all possible biases, but to try and identify them and state explicitly what they are, how they may affect the research and what has been done to minimise their impact on the process. In my case, I believe that business being part of society, having certain rights and deriving benefits from its operational environment, also has certain responsibilities towards the society. I welcome the UN Guiding Principles and I think that global norms for corporate human rights responsibility are important. That being said, I do not see the UN Guiding Principles as a panacea for prevention of business-related human rights harm. The UN Framework and the Guiding Principles are voluntary. They do not establish enforcement and accountability mechanisms. Moreover, the UN Guiding Principles leave a considerable degree of flexibility for business to shape their human rights due diligence processes depending on their context of

operations. It is not clear from the Guiding Principles how to assess the effectiveness of efforts made by companies to minimise negative human rights impacts. The effectiveness of the new global norms depends on further steps to disseminate the UN Guiding Principles and ensure implementation by companies.

Although my general position is in favour of the UN Guiding Principles, starting the research process I had a rather neutral view on the object of inquiry, the risk-based approach to corporate human rights responsibility. I had not studied the concept of risk in this specific context before, and I could therefore start as far as possible with a ‘clean sheet.’ Keeping this neutrality throughout the fieldwork I was looking for different perspectives and even conflicting views on the issue of risk in the UN Guiding Principles. In this thesis I attempt to present as balanced picture as possible. However, a challenge is that the majority of contributions and documents associated with the UN Guiding Principles are produced by actors who are also in favour of it. Although some stakeholders were critical to the UN process, they were mainly worried about the UNHRC doing too little to achieve a substantial change in status quo. And we can only guess what views those stakeholders who were absent from the consultations process have.

## **2.3 Data Collection**

Using multiple sources of data is another characteristic of qualitative research strategy. The present thesis is based on empirical data collected through the fieldwork. This involved direct and personal contact with relevant informants in their own environments, which is important for understanding participants’ perceptions and their context. As noted, the data was collected from three primary sources: document review (official UN documents and related materials), observation of the Working Group’s meeting with stakeholders, and interviews with key informants mainly individuals working at or with the UN. Because this research focuses on the UN process, the main fieldwork site

was the UN Office in Geneva, in particular the OHCHR, but some of the interviews were conducted in Copenhagen and Oslo.

### **2.3.1 Document review**

The main source of UN documents was the compilation of documents at the special online portal funded by the Swiss Federal Department of Foreign Affairs and administered by Business & Human Rights Resource Centre, an independent resource centre for business and human rights issues (SRSG Portal 2012). I consider this source as reliable and not biased or selective in what documents are published because the portal was initiated for the purpose of helping the SRSG to make the process as transparent and consultative as possible.

Ruggie and his team prepared a great number of documents throughout the mandate. The documents reviewed for this study included the mandates issued by the UNCHR and the UNHRC; the main reports developed by the SRSG; reports from regional, sectorial and multi-stakeholder consultation meetings; submissions to the SRSG by stakeholders and their commentaries on his work; speeches held, interviews given and surveys conducted by the SRSG Ruggie throughout his two mandate terms. In addition to these documents, I studied the work of the UN Working Group by reviewing the recent documents: the mandate, the outcome of the first session 16-20<sup>th</sup> of January 2012, and the document containing working methods and priorities. The overview of the documents reviewed is provided in Appendix 1 to this thesis. The research question was guiding the review process, and I focused on how the concept of risk evolved throughout the mandate, how it was interpreted and applied and what broader contextual setting it was part of.

Not all of the documents reviewed were considered by me as relevant for the research question, but a general overview of issues and discussions helped me to better understand the context in which the risk-based approach emerged and what are the outstanding issues. Documents that appeared less relevant were screened using the 'key-words search' method. After a thorough

review of the central documents, I identified a number of key words, which frequently appeared in contexts of particular relevance for this study. These key words were: risk, impact, actual, potential, method, tool, and methodology. I read those parts of documents where the key words were found. When they seemed relevant for the research question, I studied the respective documents more carefully. However, such automatic search is not a perfect way to gather qualitative data, because the machine searches only the chosen words, and not other synonyms that could be relevant. However, as I based the choice of the key words on preliminary document and literature review, and these words were the ones used in most of the instances where the concept of risk and its application were addressed, I nevertheless relied on this method. As the amount of documents produced during 6 years of SRSg's work is voluminous, and the time for this research is limited, it was not feasible to study all the documents in detail.

### **2.3.2 Observation**

The observation used as a data source in this research was the meeting of the Working Group with stakeholders on 20 January 2012. Among participants were representatives from NGOs, governments, companies, business associations and academia. The meeting was part of the first session of the Working Group and took place at the UN Office in Geneva. In order to get access to the meeting, a formal invitation and registration was necessary. I applied to attend the meeting in the capacity of researcher and was granted access without obstacles.

The observation was useful as it improved my understanding of the topic and complemented the findings from the document review. During the meeting many issues were discussed. I kept my focus on the research question in order to collect relevant information, but the wider debate contributed to my understanding of the context. Although the meeting did not address the concept of risk explicitly, references were made to human rights due diligence methodology, which embraces risk assessment and management. I used my

interpretation to analyse what significance this discussion on methodology had for my study. I later used some of the interviews to test whether my interpretation was shared by the key informants from the Working Group and the OHCHR, who were also present during the meeting.

One technical challenge was the recording of the meeting as the sound was directed into earphones of each participant and the volume in the room was too low for the recorder. Only small parts of the recording were possible to use for the data analysis. Prepared for that outcome, I took extensive notes and tried to capture as much information as possible. It helped me both in the preparation for the meeting and during the data analysis that many of the interventions by stakeholders were based on written submissions available online.

### **2.3.3 Interviews**

Interviews were the third source of data used in this study. Getting a good interview largely depends on the preparation. Developing a relevant interview guide in advance is crucial, but the interviewing process itself is important as well. Moreover, accurate notes are crucial. Therefore all my interviews except one were recorded and transcribed. The one, which was not recorded, required taking detailed notes in the course of the interview.

Initially I planned to conduct in-depth interviews, which can often last longer than one hour. However, as my key informants had many important commitments and were constrained in time, I had to opt for focused interviews. In total five one hour-long interviews were conducted.<sup>15</sup> Two interviews with representatives of the OHCHR were carried out in Geneva. Two interviews were conducted in Copenhagen, one with the chair of the Working Group and one with a risk analyst at the Danish Institute for Human Rights. The interview with a risk classification manager at Det Norske Veritas (DNV) took place in Oslo. The interviews were conducted in the period

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<sup>15</sup> The overview of the names of the informants, positions and contact information is provided in Appendix 1.

December 2011 – March 2012. I chose informants based on available information about key actors in the UN process and guided by my understanding of who among them could provide rich information on my research question. The interviews with the OHCHR and the Working Group representatives are most important as these personalities are among the central actors co-ordinating the work and driving the UN business and human rights agenda forward. They also have a tremendous knowledge on the issue of human rights and business and are among the most informed actors with regard to the work of the SRSG Ruggie. I considered interviewing John Ruggie online, as he was based in the US at the time. However, given his busy schedule, the contact with him was limited to the indirect e-mail correspondence through a representative at the OHCHR. My sample of interviews is rather small. However, in my opinion I have chosen the most information-rich cases given the limited time and available resources.

Getting access to potential informants I realised the importance of networks in field studies. I used the so-called snowballing technique in identifying new informants. My first contact was the Delegation of Norway in Geneva. I aimed at getting contact information of key UN officials in the secretariat, who worked with the Ruggie's mandate. I started to contact relevant officials shortly after arriving in Geneva, as I was prepared to be waiting some time to get answers given the busy time schedule of diplomats. Setting up an interview with the OHCHR was not a problem, however also there I had to be patient. The first interview took place in December 2011, which allowed sufficient time for literature review and document study in advance. Getting in touch with each potential informant I referred to the person who suggested him or her to me. This way it was easier to get response and set up an interview. I think I got a chance to talk to one crucial informant, the chair of the UN Working Group, owing to these recommendations.

Preparing for interviews I reviewed the profiles of my informants, their job description, field of expertise and previous experience. This allowed me to formulate questions that were specific to their work and knowledge. The



interviews were open-ended, and took form of conversations where new issues and question emerged in the process. Having interview guides<sup>16</sup> was useful to structure the conversations and to allocate proper amount of time to each of the questions. I aimed at asking open and non-leading questions in order to let my respondents elaborate freely on their thoughts and perspectives, and not creating any biases by posing leading questions. Not only researchers are prone to having biases. Informants too have their personal and professional backgrounds and agendas. Interviewing my key informants I tried to identify these biases both through direct questions and ‘reading’ between the lines.

## **2.4 Data Analysis**

Data analysis was not a separate phase of this research project, rather I analysed data while gathering it, when I interpreted it and when I wrote the thesis. The data analysis process started already when reading the first document – the UN Guiding Principles – and formulating the research question and it continued throughout the whole research process. Each new source of data was interpreted in the light of previously analysed sources. As the initial document study preceded the other two methods, it largely informed what questions were asked during the interviews and what issues I focused on during the meeting with the Working Group. Analysing the data I looked for patterns and corroboration across the three data sources, keeping a particular focus on how participants perceived the concept of risk in the UN Guiding Principles and on their ideas about the risk based-approach to corporate human rights responsibility.

After the first round of interpretation, I looked at the documents and my notes again and again, moving back and forth between the different data sources, concentrating on one issue at a time, but keeping the broader context in mind. Such a cyclical data analysis helped me to understand more in-depth the meaning of information from the different sources. Each time I consulted a

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<sup>16</sup> Samples of interview guides are available in Appendix 2.

data source again, I understood it better and sometimes discovered new details. When the central documents and notes from interviews and observation did not offer additional insight, I considered the main phase of the data analysis completed and concentrated on the writing process.

## **2.5 Reliability and Validity of Qualitative Research**

Evaluating the quality of qualitative research is not an easy task. There is no consensus on what the standards for evaluation should be, but it is common to talk about validity and reliability of research. In general validity in qualitative research means that the study is trustworthy, i.e. the findings are accurate and credible (Creswell 2009: 191). Some of the threats to validity in qualitative research lie in inaccuracy or incompleteness of data, in imposing a framework of meaning on the issue under study, and in ignoring alternative explanations or theories (Robson 2002: 171-172).

The strategy for dealing with validity threats used in this study included producing thorough and accurate notes during collection of data, as presented above, and triangulation of data. *Triangulation of data* means using multiple sources for data collection to enhance the rigour of the research (ibid.: 174). I have used three different sources of data: documents, observation and interviews. Data triangulation helps to increase credibility of interpretation of data if findings from one source are consistent with the findings from a different source (Stake 1995: 112-113). In the process of data collection and interpretation, I was actively looking for both corroboration and discrepancy in the information. However, as discussed more extensively in the following section, one challenge was that most of the stakeholders who were active in the UN process were in general in favour of the UN Framework and the Guiding Principles. Although some contradicting views were evident, they were often camouflaged in the diplomatic language of the UN.

Reliability of research is the second major element, which is crucial for trustworthiness of qualitative research. Reliability is concerned with stability

or consistency of responses (Creswell 2009: 190). A reliability test is used, for instance, when a case study is replicated to check that the same findings and conclusions can be obtained when following the same research design (Yin 2009: 45). With qualitative research designs, it may be a challenge to replicate the research as social phenomena or perceptions of them may evolve and change. Therefore, it is important to show the reader that the research has been carried out in a thorough, careful and honest way (Robson 2002: 176). For this research project I have created a research database, with all documents, field notes, interview records and transcriptions. In Appendix 1 I have provided an overview of the central documents analysed, the interviews conducted and the details about the UN meeting I observed. Samples of interview guides are available in Appendix 2.<sup>17</sup>

## **2.6 Ethical Considerations**

Accuracy of data and reporting is not only an issue of validity of research; it is also an ethical concern. Obvious mistakes in data collection and analysis would mean being unfair towards the sources of information, whether they are people or documents written by people. Collecting the data I was very careful in making correct and detailed notes and transcribing interviews with due care. I consulted key sources of data (the central documents, the transcriptions of interviews and the notes made under observation) several times under the data analysis phase. When I discuss my main findings in chapters 4 and 5, my aim is to do this in a fair and honest way. However, as qualitative research is all about interpretation, I do not exclude the possibility that other researchers would interpret my data differently based on their own worldview, knowledge and experience.

Entering the research field and getting access to the data was not problematic. As the mandate of the SRSG explicitly required an open and transparent consultative process, I assume that all documents are made public.

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<sup>17</sup> All the evidence underlying this research can be provided on request: [katja.khardikova@gmail.com](mailto:katja.khardikova@gmail.com)

The meeting of the Working Group with stakeholders was open for researchers. As the meeting was public, there were no restrictions with regard to revealing its content in this thesis. The key informants, whom I contacted, were willing to be interviewed. Almost all of them stressed the need for more research on the UN Guiding Principles. I assume that this is partly due to their interest in disseminating and promoting the UN Guiding Principles among the wider public. Therefore I as a researcher have a responsibility to present the work on the Guiding Principles and the content of the document in an accurate and fair manner.

All interviewees were informed about the terms in advance and had given their consent for the interviews to be recorded and cited in this thesis. I also made it clear that whenever my informants wished to express their personal view on the issues, I would make sure not to report the information as if it reflected the position of their respective organisations. Total anonymity of informants was not an issue, but two of the five informants, one from the OHCHR and another working for DNV, wished to be referred to only by the positions held, and their requests were respected.

## **2.7 Concluding Remarks: Limitations of the Research**

This research is limited to an exploratory inquiry. It is not explanatory, nor was it aiming at developing a theory on the concept of risk in the UN Guiding Principles. The aim is to identify patterns and derive hypothesis on the role of the concept of risk in the UN Guiding Principles. The study offers some insights on the risk-based approach to corporate human rights responsibility. The findings of this research could be used as a starting point for new research projects for descriptive and explanatory purposes, and in the thesis I suggest some issues and questions, which could be looked at in further research.

Due to the limited time and resources and the rapidly increasing amount of information on business and human rights, limiting the amount of data was a necessary measure in order to finish this study on time. The work with

further operationalisation of the UN Guiding Principles and their implementation continued during the writing phase of this research project. I had to draw the line after the last interview, which took place on 5 March 2012. There is therefore a risk that this research does not take into account important developments, which took place after that. However, I kept an eye on further work of the Working Group and included one additional document, which I considered important and relevant for the research question. The report of the Working Group to the UNHRC of 10 April 2012 (UNHRC 2012) contains a summary of the meeting with stakeholders in January which I observed, and outlines a preliminary strategy for the remainder of the mandate. I used this document to verify my previous findings and analysis.

### **3 Theoretical Framework**

Business responsibility vis-à-vis the society has been analysed by scholars with various academic backgrounds including business management, economics, sociology, political science, law and philosophy (Crane et al. 2008: 58). Many of these contributions have come to form a relatively young multi-disciplinary field of CSR. At the first glance the UN Guiding Principles seem to apply a somewhat different logic than the mainstream approaches to CSR. However, at a closer look, both share many of the central characteristics. Therefore, I have used CSR literature and theories to develop a theoretical and conceptual framework for this research. In particular, I use the shareholder value theory and the stakeholder theory as paradigms, or ways of thinking about corporate human rights responsibility. The contrast between the two paradigms constitutes the theoretical basis for the argument in this thesis.

#### **3.1 Theoretical Dimensions of Corporate Responsibility**

##### **3.1.1 Corporate Social Responsibility**

Archie Carroll offers a comprehensive overview of the evolution of the CSR concept starting from the 1950s (Carroll 1999, Carroll 2008). Due to the diversity of scholarly backgrounds, CSR literature is highly diverse with regard to definitions of the concept and its fundamental tenets. In fact, there is no consensus on what CSR means, and there is a great variety in practical approaches to CSR. This contributes to ambiguity of the concept. However, some essential features seem to be shared by many CSR theorists. Crane, Matten and Spence suggest six core characteristics of CSR, which are in one or another way present in most of the CSR perspectives (Crane et al. 2008: 7-9).

First, CSR is concerned with voluntary activities that go beyond the compliance with the law. Second, CSR deals with internalisation or management of positive and negative externalities, i.e. respectively the

benefits and costs for those affected by the company's business, which are not accounted for by the firm and not reflected in the prices of its products or services. Third, CSR is concerned with interests of various stakeholder groups, not only shareholders, but also consumers, employees, suppliers and local communities. Further, CSR is an attempt to align social and economic responsibilities, which means that a company can ensure profitability while being socially responsible. Fifth, CSR is not only a set of business practices and strategies, but it is based on ethical values that underpin the company's practices. And last but not least important, CSR is about the impacts the entire operations of a company have on society, and is, thus, beyond pure philanthropy. This means that CSR is embedded throughout the whole business cycle of a firm, rather than being an add-on to the core business activities. Any definition of CSR includes one or several of the six components and frames them based on various philosophical assumptions. In the renewed European Union (EU) strategy on CSR, which draws on the work of the SRSG, CSR is simply defined as "the responsibility of enterprises for their impacts on society" (EC 2011: 6).

There are many theories on CSR and various taxonomies of them.<sup>18</sup> Some scholars group CSR theories according to four aspects or dimensions: instrumental, political, integrative, and ethical (Garriga and Melé 2008: 78-98). Instrumental theories focus on the economic aspects of the relationship between business and society and view CSR as a means to earn long-term profit. Through this lens, improved risk management and reduced costs have often been used as the so-called business case for CSR, a financial rationale for adopting CSR policies and processes. Political theories emphasise the social power of corporations in their relations with the society, and the inherent responsibilities in the political realm associated with this power. They stress the importance of using the power in a responsible way. Integrative theories stress that business depends on the society for its success and even survival, and therefore it needs to integrate social demands and ensure

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<sup>18</sup> See for instance Carroll (1999, 2008), Garriga and Melé (2008) and Crane et al. (2008).

compliance with social values. Finally, in ethical theories the relationship between business and society is built on ethical values and principles; social responsibilities of companies are viewed as their ethical obligations with the ultimate goal of achieving a good society. The instrumental, political, integrative and ethical aspects are interconnected dimensions rather than mutually exclusive categories, and any CSR theory could include more than one of these aspects (ibid.: 94).

### **3.1.2 Corporate Human Rights Responsibility: an Emerging Discourse?**

Karin Buhmann, Lynn Roseberry and Mette Morsing (2011: 1-22) argue that one important difference between the general CSR paradigm and the emerging discourse on what they call business responsibilities for human rights (BRHR). The authors maintain that the “emerging discourse on BRHR has increasingly come to be a discourse on the state duty to protect” (ibid.: 4). The Framework is based on the idea that responsibilities of states and TNCs are differentiated but complementary (UNHRC 2008a: 4), while CSR focuses only on companies and their social responsibilities. However, John Ruggie states that corporate responsibility to respect human rights exists independently of the ability and willingness of governments to protect and promote human rights (ibid.: 17, UNHRC 2011a: 13). Thus, the second pillar can be seen as separate from the first, and corporate human rights responsibility can still be seen through the lens of CSR theories.

The second difference is that CSR is broader than corporate human rights responsibility because it embraces other issues as well, including impacts on the environment and economic and social development in a broader sense (Buhmann et.al. 2011: 5). Thus, it is argued that corporate human rights responsibility covers only human rights and labour rights dimension of CSR. However, in the sustainability perspective human rights are not an isolated area. They are related to economic and environmental aspects as well, as all three dimensions of sustainability are interconnected.



Environmental harms are often connected to claims of adverse human rights impacts (UNHRC 2008b: 2). Environmental concerns are relevant for such human rights as the right to health, right to life, rights to adequate food and housing, minority rights to culture, indigenous peoples' right to their land. Access to clean water is also a frequently raised concern as large-scale agriculture and industrial activities may impede access to clean water or pollute water supply (ibid.: 14, 23). Especially in areas where the environment constitutes livelihoods for people, negative impacts on the environment may contribute to economic challenges for communities. Pollution, irresponsible waste management practices, deforestation and environmental degradation considerably undermine the ability of people in local communities to make a living. Moreover, companies paying unfairly low wages to their workers violate human rights and undermine the economic sustainability for people and communities.

Third, Buhmann, Roseberry and Morsing stress, that "the corporate responsibility to respect as defined by the SRSG Ruggie also entails a stronger compliance element than is assumed by the conventional CSR discourse" (Buhmann et.al.: 4). On the one hand, the UN Framework and the Guiding Principles use a legalistic language of "obligations, compliance and liability" while the CSR discourse is 'softer' and is based on voluntary action (ibid.: 5). On the other hand, it should not be forgotten that the UN Guiding Principles are still voluntary unless states or multilateral organisations make the norms legally binding. Thus, corporate responsibility to respect human rights is in principle voluntary for companies, as is CSR.

CSR is by many considered to be beyond legal compliance. In theory legal compliance refers both to national and international law. In practice, however, many companies take national laws as the basis for their responsibilities and develop CSR policies and practices on top of that. Therefore, whether a company's responsibilities are in line with international human rights norms depends on the extent to which international law is incorporated into the national legislation and the degree of enforcement.

Seeking to overcome this governance gap, the UN Guiding Principles state that corporate responsibility to respect “exists over and above compliance with *national* laws and regulations protecting human rights” (UNHRC 2011a: 13, emphasis added). It is now expected that companies will respect *international* human rights norms regardless of the degree of enforcement in the country of operations. Moreover, in conflict situations companies ought to respect humanitarian law as well (ibid.: 14). However, the Guiding Principles do not call on companies to take additional measures beyond legal compliance with international human rights norms, although business is not discouraged from doing so.

Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations. (ibid.: 13)

It is important to note that the corporate responsibility to respect human rights is considered as a ‘negative duty.’ This means that the expected baseline for companies is that they do not infringe on human rights of stakeholders. Thus, in order to discharge corporate responsibility to respect, companies should adopt policies and procedures that ensure that they ‘do no harm.’ However, the SRSG points out that this does not mean passivity, but may require such positive steps as, for instance, introducing specific recruitments and training programmes to ensure that workplace anti-discrimination policy works in practice (UNHRC 2008a: 17). According to Muchlinski, this could be interpreted as a positive duty, a “positive element of action” and not just a passive avoidance of harm (Muchlinski 2012: 148). However, this research shows that some of the leading actors in the UN process, such as human rights and business experts in the OHCHR and the Working Group, interpret corporate responsibility to respect human rights as a ‘negative duty’ for companies to respect as opposed to the ‘positive duty’ of states to protect, promote and fulfil (interview, Wendland 2012; interview, Jungk 2012).

The root of disagreement lies probably in the understanding of the term ‘negative duty.’ For Muchlinski it seems to mean passivity, while the UN Guiding Principles clearly expect an active approach to corporate responsibility to respect human rights. Thus, Muchlinski interprets this as a positive duty. For the representatives of the OHCHR and the Working Group, negative duty does not mean to ‘take no action’ (interview, Wendland 2012; interview, Jungk 2012). Rather, it means that companies through human rights policy and due diligence process are required to take all necessary steps to ensure that they respect human rights in their activities and throughout their relationships with other actors. But this does not mean that they are required to take on the responsibilities of states with regard to human rights. Companies are specialised organs of the society, and as such are not supposed to carry out state functions unless formally delegated to do so by the public authorities.

Interestingly, the key informants from the OHCHR and the UN Working Group were all stressing the difference between CSR and corporate responsibility to respect human rights. They seemed to have severe doubts about the potentials of the traditional CSR discourse in promoting corporate human rights responsibility, due to the conceptual ambiguity of CSR, its voluntary character and the ‘beyond the law’-approach. They were advocating a separate discourse for corporate human rights responsibility based on a three-fold foundation: a stronger legal argument, the power of social expectations towards business, and the self-interest of companies in avoiding economic risks associated with human rights violations (Ruggie 2011a). This three-fold foundation will be central for the argument in chapter 5. Here it is important to note that emphasising the difference between CSR and the UN Guiding Principles was a strategic move, which was needed in order to push forward the previously stalled debate on business and human rights norms. However, I suggest that the theoretical underpinnings of corporate human rights responsibility and CSR are in fact congruent.

### 3.1.3 Corporate Human Rights Responsibility and CSR

CSR and corporate human rights responsibility both stress the need for business to internalise negative externalities borne by stakeholders. The core of both CSR and corporate human rights responsibility is that they are embedded into the company's decision-making processes and operational practices rather than being additional to the core business. It is about how business operates, rather than philanthropic and development projects that companies run on top of business as usual.

All four dimensions of CSR delineated above<sup>19</sup> are explicitly or implicitly reflected in the UN Guiding Principles. First, in the instrumental dimension, the Guiding Principles imply that corporate human rights responsibility helps companies to manage a broad range of business-related risks, such as operational, legal, reputational, and financial. This corresponds to the third foundation of corporate responsibility to respect human rights, i.e. the self-interest of companies in avoiding economic risks associated with human rights violations. In chapter 4 I explore the links between human rights risks and business risks.

The political dimension lies in the recognition of businesses as “specialized organs of society performing specialized functions” resulting in a requirement to “comply with all applicable laws and to respect human rights” (UNHRC 2011a: 6). This corresponds to the first foundation of the corporate human rights responsibility, i.e. the legal argument and accountability, which is discussed in chapter 5.

The integrative dimension of corporate responsibility is expressed in the “basic expectation society has of business in relation to human rights” (ibid.: 4). Corporate responsibility to respect human rights is a way to achieve legitimacy for company's business activities, a basis for ‘social license to operate’ (UNHRC 2008a: 17). This corresponds to the second foundation of the corporate human rights responsibility, i.e. the power of social expectations towards business, which is also discussed in chapter 5.

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<sup>19</sup> See sub-section 3.1.1.

Observant readers will have noticed that there are only three foundations for corporate human rights responsibility, while there are four theoretical dimensions in CSR. Indeed, there is no explicit ethical or normative foundation in the second pillar of the Guiding Principles. However, I suggest that the ethical dimension runs throughout the UN Framework and the Guiding Principles they address universal inalienable rights attributed to all persons, and respecting them is largely considered as a morally right thing to do. According to the first chair of the Working Group Margaret Jungk, one reason for leaving the ethical dimension out may have been that the SRSG Ruggie wanted to stay as neutral as possible in this regard, as ethical issues are difficult to get a consensus on (interview, Jungk 2012).

The general CSR paradigm constitutes an overarching theoretical and conceptual framework for this study. However, I have found that two CSR theories are particularly relevant for the research question. One of the core arguments in this thesis is that the aim of the UN Guiding Principles is to shift from the traditional business approach to risk management with the main focus on shareholders to a broader stakeholder approach, which would also give attention to human rights risks of the company's stakeholders. Therefore in the following I discuss the competing shareholder value theory and the stakeholder theory with a focus on the contrast between the two.

### **3.2 Shareholder Value vs. Stakeholder Responsibility**

Shareholder value theory is grounded in economics and has a strong instrumental dimension. It states that the only social responsibility of business is to make profits and maximise the economic value for shareholders (Melé 2008: 55). Stakeholder theory has both integrative and ethical elements. Unlike the shareholder value theory that focuses exclusively on financiers of the firm, stakeholder theory maintains that business is responsible to all individuals and groups who are in one or another way affected by the company

or can affect its decisions and practices (Freeman et al. 2010: 26). Of all the CSR theories the strongest contrast is between the shareholder value theory and the stakeholder theory. They represent two competing moral and political philosophies with different views on business responsibility towards the society. They are also the basis for the respective points of view of opponents and proponents of corporate social responsibility.

### **3.2.1 Maximising the Shareholder Value**

Shareholders of a company, either its owners or investors, own a share or a stock in a company and have interests in profitability of the business. Corporate managers are their agents and have a responsibility to maximise the profits. Shareholder value theory is aligned with neoclassical economic theory, which has dominated the curriculum of many business schools (Melé 2008: 55-6). Especially in the Anglo-American business models, this view on the role of business in the society is prevailing because it is supported by the corporate law and the strong ethical argument for protection of shareholders' property rights (Muchlinski 2012: 162).

The famous article "The Social Responsibility of Business is to Increase its Profits" by the Nobel laureate Milton Friedman written in 1970 is a major contribution to the shareholder value school of thought. Friedman views managers as agents of company's owners, i.e. the employers, and the primary responsibility of managers is their fiduciary duties to the owners.

That responsibility is to conduct the business in accordance with their [owners'] desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom. (Friedman 1970: 33)

This does not mean that Friedman supports managers in maximising profits by any means, although he is sometimes misinterpreted in that way. Rather, according to the quote above, he argues that business ought to pursue this goal in a way that does not break the laws and violate ethical custom of the society.

It can be argued that international human rights are also ethical customs. Thus, the UN Guiding Principles are not inconsistent with the shareholder value theory. However, Friedman talks about local laws and customs in the country of operation and not about the international law. As previously mentioned, for many countries this way of thinking leaves the gap between the national law and international human rights norms unaddressed.

In support of the shareholder value theory it has been argued, that “conducting business for self-interest, presenting profits as the supreme goal, and operating under conditions of free and competitive markets within a minimalist public policy are the best conditions for wealth creation” (Melé 2008: 60). Friedman emphasises that managers are no experts on societal issues and should not engage in redistribution of income. Companies pay taxes, and it is up to politicians to decide, through democratic procedures, how these taxes should benefit the society (Friedman 1970: 34-36). That said, Friedman does not exclude the possibility that a company can invest some of its profit in the local community or in measures to improve the government, but only if it benefits the shareholders in the long run (ibid.: 36). The notion of long-term benefits for shareholders is important for the argument in this thesis. As will be discussed in chapters 4 and 5 human rights abuses may pose business risks to companies and undermine the managers’ ability to maximise shareholder value.

### **3.2.2 Stakeholder Approach: Telling a New Narrative about Business**

In contrast to the shareholder value theory, stakeholder theory stresses that managers bear responsibilities not only towards shareholders, but other stakeholders, e.g. customers, employees, suppliers and communities, as well. Clarkson defines stakeholder theory as an approach where the firm is seen as “a system of stakeholders operating within the larger system of host society that provides the necessary legal and market infrastructure for the firm activities,” and where the purpose of the company is “to create wealth or value

for its stakeholders by converting their stakes into goods and services” (Clarkson 1995, cited in Melé 2008: 63).

Stakeholder theorists stress that in order to understand business one has to understand the interaction among all stakeholders and know how relationships between them and the firm work (Freeman et al. 2007: 3). In a broad sense, stakeholders represent “any group or individual that can affect or be affected by the realization of an organization’s purpose” (Freeman et al. 2010: 26). In a more narrow definition, the term stakeholder refers to “those groups without whose support, the business would cease to be viable” (ibid.). Some scholars distinguish between primary and secondary stakeholders. Among primary stakeholders are employees, customers, local communities, suppliers and financiers (owners or shareholders). These groups are seen as crucial for company’s success (ibid.). Secondary stakeholders are, for instance, governments, competitors, special interest groups, consumer advocate groups and media (ibid.: 24). These groups may in a varying degree influence business decisions. For instance, governments affect companies through regulations and concessions, especially in the case of extractive industries, while advocacy groups and media may affect the reputation of the firm either through negative or positive publicity.

Successful stakeholder management builds on the ability of managers to take into consideration all legitimate interests of relevant stakeholders in the policies and decision-making throughout the whole business cycle, and address issues case-by-case. This implies stakeholder engagement, but does not mean direct presence of all stakeholders in every decision-making process (Donaldson and Preston 1995: 67). Freeman stresses that the primary responsibility of managers is to create as much value in a broader sense, for legitimate stakeholders as possible, ideally without making trade-offs. In stakeholder theory there is a possibility of joint interests among different stakeholders, and the manager’s task is to see how conflicting interests may be redefined or reinterpreted so that all interests can be satisfied. When this is not possible and trade-offs are inevitable, the goal is to improve the system in



order to try and avoid a similar dilemma in the future (Freeman et al. 2010: 28).

### 3.2.3 Stakeholder Theory and Human Rights

The basis for legitimacy of stakeholder theory lies in two ethical principles, which are relevant for human rights: the principle of corporate rights and the principle of corporate effects (Evan and Freeman 1988, in Melé 2008: 64). These principles are based on Kant's categorical imperative, which in one of its formulations is as follows: "one ought to treat others as having intrinsic value in themselves, and *not* merely as means to achieve one's end" (in Donaldson and Werhane 2002: 7). The former principle states that "the corporation and its managers may not violate the legitimate rights of others to determine their future," while the latter says that "the corporation and its managers are responsible for the effects of their actions on others" (Melé 2008: 64).

Stakeholders may make many various claims on the company, also some that go beyond respect for their human rights. Gibson argues that whether the firm has an obligation to meet that claim is determined by the basis of the claim, and the basis will be stronger the more the stakeholders' interests are rooted in basic human rights (Gibson 2000: 250). He further suggests a continuum of claims from "deprivation of subsistence" to "supererogatory claims" (ibid.). The closer stakeholder claim is to the former, the more legitimate it is, and will be of priority before other more excessive claims.<sup>20</sup> For fundamental human rights such as the right to life and health and freedom from forced labour, it is clear that business would give priority to these before, for instance, the freedom of expression.

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<sup>20</sup> Recall the discussion on the 'negative duty' not to infringe on human rights under 3.1.2.

### 3.2.4 Critique of Stakeholder Theory

Stakeholder theory has been criticised by many scholars holding various theoretical positions,<sup>21</sup> but the main body of critique of stakeholder theory comes from the shareholder value camp. Stakeholder theory has been accused for being an excuse for managerial opportunism (Jensen 2001, Marcoux 2000). Jensen argues that stakeholder approach politicises the firm and gives managers power to follow their own goals and preferences in using company's resources, which will lead to undermined competitiveness (Jensen 2001: 10). In the relation to the distinction between negative and positive duties, this argument is relevant for the latter. For the 'negative duties' and the UN Guiding Principles this seems less relevant, as corporate responsibility to respect human rights is seen as a baseline for company's conduct rather than an expenditure post for community projects or philanthropy.

Some scholars have argued that the weakness of stakeholder theory is in the lack of clear ethical guidelines for identifying key stakeholders. Jensen argues, that "stakeholder theory directs corporate managers to serve "many masters" and "when there are many masters, all end up being shortchanged" (ibid.: 9). As will be discussed in chapter 5, identifying relevant stakeholders and their legitimate representatives is in many cases a challenge for companies. However, it is arguable whether it is feasible to have ethical guidelines to identify them. There would also be a risk of defining a narrow set of key stakeholders and ignoring some other legitimate stakeholder groups. The flexibility in identifying legitimate stakeholder may be seen as strength too, as there are great variations in operational contexts of companies. Companies would need to map out their operational contexts, find reliable information and consult human rights experts to find out who their stakeholders are.

Stakeholder theory is also criticised for being unable to provide clear guidance on how to make trade-offs between legitimate but competing

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<sup>21</sup> An overview of general criticism of stakeholder theory is offered by Domènec Melé (2008: 67-68). Freeman and his co-authors reply to the critique in their recent work (Freeman et al. 2010: 10-18, 226-231). Here I focus on those arguments, which are of particular relevance for the research question.

interests of stakeholders when this is necessary. Stakeholder theory does not provide sound ethical guidelines in balancing interests and demands of their stakeholders. It lacks criteria for how to make a decision in case of conflict between interests (ibid.: 13). As will be discussed in chapters 4 and 5, for human rights, severity of abuse should be a clear criterion, however, for some human rights, trade-offs between different stakeholder constituencies may be a difficult exercise, and prioritisation poses a number of challenges.

Although the contrast between shareholder and stakeholder approaches may be seen as strong, a number of stakeholder theorists including Freeman suggest that Friedman's view is not incompatible with the stakeholder approach. They even call Friedman an early (instrumental) stakeholder theorist (Freeman et al. 2010: 10-11). Friedman does not exclude possibility to engage in CSR if it benefits the shareholders in the long run. The main difference in the approaches is, however, that Friedman believes that what makes business successful is maximising profits. Stakeholder theorists suggest that responsible management that satisfies stakeholder interests is a prerequisite for profit maximisation (ibid.: 11-12).

### **3.3 Concluding Remarks**

The shareholder value approach still dominates the business community's thinking on CSR. Where governance gaps between the national regulations and the international human rights norms exist, the focus on shareholders and maximisation of profits is likely to undermine corporate human rights responsibility. The UN Guiding Principles focus on stakeholders and stress the crucial importance of taking a broader stakeholder approach in order to ensure that companies respect human rights. The theoretical framework for this research is based on contrasting two competing paradigms, the shareholder value theory and the stakeholder theory. It is the relationship between the two worldviews, which is central for this study.

## 4 The Concept of Risk in the UN Guiding Principles

How is the concept of risk applied in the UN Guiding Principles? This chapter answers the first part of the research question, while the second part concerning the reason for adopting the risk-based approach is addressed in the next chapter. Here I examine first some central issues concerning the concept of risk in general. Second, the specific meaning of the concept of risk in business and human rights will be analysed. Finally, I look at how the concept of risk emerged throughout the mandate of John Ruggie, and what role it has in the UN Guiding Principles.

### 4.1 The Concept of Risk

#### 4.1.1 A Challenge of Definition

As mentioned, there is no universal definition of *risk*. The term is used in theory and in practice in a number of different ways. Among broad categories of risks are business-related, financial, social, environmental, political, military, and health and safety risks. In an economist definition, risk corresponds to “any situation where some events are not known with certainty” (Chavas 2004: 5). According to the Institute of Risk Management (IRM) risk is “the combination of the probability of an event and its consequence,” which “can range from positive to negative” (Hopkin 2010: 12). There are countless ways of describing risk. Various actors and disciplines apply their own definitions, contributing to, what Randall calls an “etymological mess” in the use of the term (Randall 2011: 31).

In this research I use the general definition of risk developed by the International Organization for Standardization (ISO) in the ISO 31000 standard “Risk management – Principles and guidelines.” Here risk is defined as “effect of uncertainty on objectives” (ISO 2009: 1). The ISO definition is kept broad in order to facilitate application of the risk management standard in

any type of entity, private, public, community, association, a group or even to individuals. ISO 31000 is not industry or sector specific and is claimed appropriate for any type of risk (ibid.: 1). Thus, it could in principle be applied to human rights risks. ISO is a non-governmental organisation that forms a network of national standard institutions of 162 countries. Experts participating in development of various standards come from both public and private institutions of their respective countries (ISO 2012). The ISO standard represents a broad consensus between states, and between private and public sector perspectives. Given the broad consensus and the general applicability of the definition, it was used in this study to inform my general understanding of the concept of risk.

Although the ISO definition of risk itself is short, it is followed by several pages of explanations and definitions of related concepts. This reflects the complexity of the notion of risk. The ISO standard clarifies that “an effect is a deviation from the expected – positive and/or negative”, “*uncertainty* is the state, even partial, of deficiency of information related to, understanding or knowledge of an *event*, its *consequences* or *likelihood*,” and objectives can, for instance, be “financial, health and safety, and environmental goals” (ISO 2009: 1-2, emphasis added). In order to occur, risk has to be caused by something or someone. A *source of risk* may be a hazard of any kind. In ISO terminology risk source is an “element which alone or in combination has the intrinsic potential to give rise to risk” (ibid.: 4). A source of risk can be tangible, i.e. material, like an explosion or a fire at an industrial site, or intangible, e.g. a large investment in business activity with a highly uncertain outcome. A *consequence* is an outcome of an event that affects objectives (ibid.: 5). A consequence can be certain or uncertain, negative or positive. In sum, risk is present in situations where there is uncertainty about possible events, their likelihood and their consequences. In general, risk is a product of the likelihood of an event and the magnitude of its consequences.

It is not my intention to give a full account of meanings and applications of the term risk here. However, it is important to understand the

main sources of disagreement in order to grasp the conceptual complexity and even ambiguity associated with the notion of risk. In the following I discuss some aspects of risk, which contribute to a variety of interpretations and applications of the concept.

#### **4.1.2 Likelihood and Probability**

The terms likelihood and probability are often used as synonyms. Likelihood corresponds to the question “what is the chance of something happening?” (ISO 2009: 5). It can be expressed quantitatively or qualitatively. When likelihood is expressed quantitatively, it is in mathematics and statistics called probability. Probability is determined by calculating distribution of outcomes on the range from 0 to 1. The higher the number, the more certain is the consequence. In order to apply classic statistical approaches and calculate approximate probabilities, we need empirical data based on large samples (Moses and Knutsen 2007: 93). This is, however, not always available, especially in case of rare accidents with catastrophic consequences, like a major fire hazard or an oil spill.

Likelihood may also be expressed in qualitative terms. For instance, we use a qualitative method when we grade likelihood of a consequence on a scale from “very unlikely” through “unlikely,” “likely” and “very likely” to “inevitable” (Waring and Glendon 1998: 28). This means that we need to define ranges for each category. They can be numerical and based on statistical probabilities: 1 - 10% could mean “very unlikely”, 11 – 20% “unlikely”, 21 – 50% “likely”, and so on. Ranges can also be intuitive, based on previous experience and perceptions of what is “likely” to happen. In practice, the term probability is often used both for quantitative and qualitative expressions of likelihood.

### 4.1.3 Risk and Uncertainty

Risk and uncertainty are often used interchangeably. Those who argue that risk and uncertainty are not substitute terms say that *risk* may be applied to events or situations where probabilities of different outcomes can be calculated, while *uncertainty* is a feature of situations where it is not possible to determine probabilities (Chavas 2004: 5-6). In a major theoretical contribution on risk, “Risk, Uncertainty and Profit” from 1921, Frank H. Knight argues that risk corresponds to measurable uncertainty, while ‘uncertainty’ itself is immeasurable (Knight 1971: 233). In Knight’s economist view, the main practical difference between risk and uncertainty is that when we are facing risk, the “the distribution of the outcome in a group of instances is known” (ibid.). A classic empirical example of *Knightian* risk is lottery. The player is familiar with the structure of the game, i.e. has perfect information about it, and can by using odds calculate the expected value of buying a ticket (Randall 2011: 34). In lottery, the possible outcomes are known, and we can calculate probabilities of various outcomes.

In more complex organisational and societal contexts, including in the field of business and human rights, this model would not prove equally useful. Randall stresses that complex systems “exhibit one or more properties or behaviours not obvious from the properties of the individual parts” (ibid.: 64). In other words, it is a difficult, if not impossible, exercise to anticipate all possible outcomes and the distribution. In real-life situations we have to deal with what Knight calls uncertainty, because we do not have perfect information.

Those who use terms risk and uncertainty interchangeably argue that, although risk and uncertainty may be distinct concepts in theory, in practice they are difficult to separate (Chavas 2004: 5-6). The term risk is therefore frequently used to describe what Knight prefers calling uncertainty. Although the term uncertainty would better suit the context of business and human rights, in the following I use the term risk, because it is used in the UN Guiding Principles.

Another distinction between risk and uncertainty is suggested by the COSO Enterprise Risk Management Framework, claimed to be used by thousands of enterprises in their internal control systems (COSO 2004: v). Here uncertainty is seen as twofold, encompassing negative consequences (risks) and positive consequences (opportunities) (ibid.: 1). In a great number of definitions, risk has only a negative connotation, as a possibility of something bad happening. Some other definitions, like the ISO one, do not exclude positive outcomes. In the present study, risk is associated with negative consequences, as risk in the UN Guiding Principles is used in the meaning of potential negative impacts on stakeholders' human rights.

#### **4.1.4 Subjectivity and Information Biases**

In social contexts, risk estimates are often more subjective than many scientists prefer to think. In many statistical approaches in the social sciences the distinction between objective and subjective is blurred. Paul Slovic argues that in the dominant conception of risk the “probabilities and consequences of adverse events are assumed to be produced by physical and natural processes in ways that can be objectively quantified by risk assessment” (Slovic 1999: 690). However, much of social science research rejects the notion of objective probabilities. As argued by Merna and Al-Thani (2008: 33), subjectivity is a key factor in risk assessment. Risk assessment is based on some assumptions about the world that cannot be claimed totally value-free.

One way in which subjectivity permeates risk assessments is in the dependence of such assessments on judgments at every stage of the process, from the initial structuring of a risk problem to deciding which endpoints or consequences to include in the analysis, identifying and estimating exposures, choosing dose-response relationships, and so on. (Slovic 1999: 690)

In risk management, experience and the way the risk is framed play an important role. Our perceptions of risk affect what we do about them (see Sitkin and Pablo 1992).



Under uncertainty we are dealing with *gross ignorance*, a term coined by Henry and Henry (2002, in Randall 2011: 34). For a decision-maker this creates an information bias. In complex societal systems there are two major types of information biases: known unknowns and unknown unknowns (Randall 2011: 105). First, we do not know everything that could be known to us. Such outcomes are *known unknowns* or the outcomes that we believe to be possible, but we either do not know if they would find place or we are not aware of the potential consequences (ibid.: 34, Merna and Al-Thani 2008: 13). Although we know that accidents, such as explosion, fire hazard or major uncontrolled pollution into the environment, may happen, they are not easily predictable in terms of likelihood and consequences. Second, some events and outcomes are unpredictable and unforeseeable. These are so-called *unknown unknowns*, i.e. what we do not know that we do not know.

Unknown unknowns are those events whose probabilities of occurrence and effects are not foreseeable by even the most experienced practitioners. These are often considered as force majeure events. (Merna and Al-Thani 2008: 13)

This is especially relevant for development of new technologies, whose possible effects on people, society and the environment are unknown.

Moreover, what is perceived as risky may change over time. For instance, new research on a medicine may discover previously unknown serious side effects. This previously unavailable to us information will then affect our perception of how risky it is to take this medicine. The amount and quality of the information available to conduct risk assessment is, therefore of crucial importance for the effectiveness of the process.

In this section some definitions of the concepts of risk and its elements have been discussed. In sum, there are many definitions of risk, but in general it can be described as uncertainty about an event, the likelihood of it taking place and the magnitude of its consequences. Risk is a complex, multi-dimensional, issue- and context-specific concept. In the following, I examine

its application in business and human rights as it is applied in the UN Guiding Principles.

## **4.2 The Concept of Risk in Business and Human Rights**

In the UN Framework and the Guiding Principles the term risk is used in two central ways. First, the term risk is used in the meaning of uncertainty about outcomes of direct or indirect involvement in or association with human rights abuses, for the company itself and, ultimately its *shareholders*. Second, and most important, the term refers to human rights risks, i.e. a company's potential adverse human rights impacts on *stakeholders*.

### **4.2.1 Business Risks**

In the business sense, risk is associated with potential losses for the firm. One way of defining business risk is as “anything, which prevents an organization from achieving its business objectives” (Spedding and Rose 2008:11). However, others view risk as a source of both opportunity and loss, or simply as uncertainty about the outcome (Hopkin 2010: 13). Merna and Al-Thani (2008: 11) suggest that most people think of corporate risk as a combination of three components: something bad happening, the chance of it happening, and the consequence if it does happen. In ISO terms, the three are: event, likelihood and consequences; and risk is a product of the latter two components.

In general it can be said that companies face two major categories of risk, material risks, e.g. economic, legal and operational, and intangible risks, such as reputational or social acceptance risks. These types of risk are interconnected as material risks may affect intangible risks, while intangible risks may finally realise as material risks for companies. For instance, an accident on an industrial site poses an operational risk because it represents a threat to safety of employees and to the material assets of the company. This is likely to result in immediate costs, such as material compensation to the

victims and reparation of the physical damage. Moreover, the more serious the accident, the larger is the chance that it will delay or disrupt the production process causing losses in income. Last but not least, if picked up by the media, negative publicity about poor safety conditions in the value chain poses reputational risks to the company.

Taylor argues that in the business sense, the concept of risk has a “distinctly cost-driven logic,” and is not primarily concerned with threats to people, but is about managing the firm’s profitability (Taylor 2011: 17). The main difference between business risks and human rights risks is that the former is risks to business itself, including its shareholders, while the latter is first and foremost the risk to stakeholders. As will be discussed later on, the focus on risks to stakeholders rather than on risks to the company would, if adopted by business, represent an important paradigm shift in corporate risk assessment and management.

#### **4.2.2 Human Rights Risks**

Human rights risks are company’s potential adverse human rights impacts (UNHRC 2011a: 16). These are risks that arise for stakeholders of the company when it operates in a way that can potentially remove or reduce their ability to enjoy human rights (OHCHR 2011a: 7). According to the Interpretive Guide to the UN Guiding Principles,<sup>22</sup> an important technical difference between business risk and human rights risk is that the former factors in two equally important elements, the probability<sup>23</sup> and the consequence, while for human rights risks, the consequence, i.e. severity of human rights abuses, is the prevailing factor (ibid.: 8). Probability is considered relevant for prioritising what human rights risks should be addressed first.

[...] if a potential human rights impact has low probability but high severity,

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<sup>22</sup> Hereafter referred to as the Interpretive Guide.

<sup>23</sup> Based on the preceding discussion, it would be more appropriate to use the term ‘likelihood’ instead of ‘probability.’ However, as the Interpretive Guide uses ‘probability,’ in this sub-section ‘probability’ and ‘likelihood’ are used interchangeably.

the former consideration does not balance the latter. The severity of the impact is paramount, understood as the “scale, scope and irremediable character” of the impact [...]. (ibid.: 37)

Thus, low probability of severe adverse human rights impacts cannot make addressing those risks less urgent. Rather, the basis for the decision on delaying a response is the degree of remediability of the potential impact. The more irremediable the human rights impact could be, the more urgent is it to address the risk.

Some human rights impacts are irremediable, e.g. a life once lost in an accident cannot be restored. Adverse impacts on health of stakeholders may also be irremediable, for example, injuries causing serious handicap. Such impacts can only be materially compensated to the victims or the bereaved. The Union Carbide chemical plant explosion in Bhopal, India in 1984, illustrates both instances of irremediable human rights impacts. The chemical disaster killed around 8000 people instantly and injured at least 150.000. Many victims are still suffering from severe health problems (MacKenzie 2002). Life and health safety risks are often caused by sudden catastrophic events, but they may also be a consequence of dangerous waste practices and long-term pollution. An example of the latter case is the Texaco (now part of Chevron) oil company’s pollution of Amazon forest in Ecuador. Starting in 1972, Texaco’s operations in the country have contributed to disastrous pollution of water, soil and air through irresponsible waste management over a period of 18 years. Irresponsible practices of the oil company affected the health of people in local communities to a degree that is not possible to treat, including in widespread instances of cancer and miscarriages.<sup>24</sup>

Human rights risks of business have traditionally been seen in terms of material and intangible risks to the company that could arise when its actions violated human rights (interview, Jungk 2012). Departure from this traditional

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<sup>24</sup> See, for instance, reports written among others by Harvard medical team and Ecuadorian health authorities on health damages caused by toxins released into the environment by Texaco/Chevron (Amazon Defence Coalition 2012).

view of risk in business is at the core of the UN Guiding Principles and its logic of human rights risk assessment and management.

## **4.3 Emergence of the Concept of Risk in the UN Guiding Principles**

### **4.3.1 The Early Stage**

The concept of risk gradually emerged throughout the mandate of John Ruggie. Reports submitted to the UNCHR and the UNHRC during the first phase of the mandate talk mainly about *impacts* of companies on human rights, without applying the term risk. The term risk is used only occasionally and mainly in the meaning of business risks, e.g. material risks to companies. The 2006 interim report refers to risk mainly when describing existing initiatives that apply risk assessment, e.g. the Voluntary Principles on Security and Human Rights and the Danish Institute for Human Rights compliance assessment tool (UNCHR 2006: 13, 19). The report further states that the “ability of companies fully to meet their human rights obligations depends in considerable measure on the availability of effective impact assessment tools at national and project levels” (ibid.: 19), but stresses that no such tool was available at that time.

The 2007 report continues in a similar vein. In addition it mentions the term risk in the meaning of business risk. First, it addresses human rights-related risks and opportunities for companies when discussing the expanding risk environment for companies due to legal claims against them in various national jurisdictions (UNHRC 2007a: 9). Second, business risks are discussed when the report maps out existing initiatives and standards for self-regulation, meaning “policies and practices that business itself adopts voluntarily, triggered by its assessment of human rights-related risks and opportunities, often under pressure from civil society and local communities” (ibid.: 18). Same year the SRSB developed a companion report called “Human rights impacts assessments – resolving key methodological issues” (UNHRC 2007b).

Ruggie outlines some preliminary principles and characteristics of human rights impact assessments, drawing on similarities with current initiatives in environmental and social impact assessments (ESIAs) and emphasising what is specific for human rights impacts (ibid.: 1). In the companion report “human rights risks” are mentioned and are used in the meaning of potential human rights impacts. However, Ruggie does not explain how the concept of risk should be understood in the context of human rights and business.

### **4.3.2 Introducing Human Rights Due Diligence**

The main report of the first mandate, the “Protect, Respect and Remedy” Framework endorsed by the UNHRC in 2008, does not focus explicitly on the concept of risk, but it is implicit in the proposed human rights due diligence mechanism. In order to discharge the responsibility to respect human rights, business is increasingly expected to conduct human rights due diligence (UNHRC 2008a: 17). In a narrow business sense, *due diligence* is an investigation process that precedes a potential investment or contract in order to confirm all material facts relating to it (Lawrence 2004: §1.01 1-4). In the context of the UN Guiding Principles,

human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights. (OHCHR 2011a: 7)

The scope of human rights due diligence of a company depends mainly on three factors: the context of operations, the impact of own business activities, and the possibility of contributing to abuse through relationships with others, state or non-state actors (UNHRC 2008a: 17). First, a thorough examination of the context of operations helps companies to understand who their key stakeholders are, and grasp the main challenges with regard to human rights in the country where they operate. Second, assessing actual and potential impacts of own operations within the given context, helps the company to gauge how

they affect stakeholders primarily in their capacity as “producers, service providers, employers and neighbours” (ibid.: 17). Finally, in addition to risks that arise from own activities, companies may be alleged to be complicit in human rights violations if they benefit from an abuse committed by a third party (OHCHR 2011a: 7). This is often an issue if the company in one way or another is associated with such actors as local authorities, business partners or suppliers with questionable human rights records.

Muchlinski argues that due diligence extended to human rights risks “requires a shift from considering the risk to the company to risk to potential victims of corporate action (Muchlinski 2012: 156). Thus, human rights due diligence follows a somewhat different logic focusing on all potentially affected stakeholders, and not only on shareholders as in the case of commercial due diligence and financial risks. Human rights due diligence is thought to help detect human rights risks at an early stage in order to avoid or mitigate adverse human rights impacts, and reveal actual human rights impacts that require proper remediation for affected stakeholders.

The 2009 and 2010 reports further discuss human rights due diligence and appropriate methodologies based on variations in companies’ size and operational context. The SRSG argues that “the corporate responsibility to respect provides companies with a pathway for managing human rights risks effectively” (UNHRC 2010: 18). Nevertheless, the reports do not provide explanation on the concept of risk when applied to human rights and do not say how to conduct human rights risk assessment.

### **4.3.3 Risk as a Key Concept**

In the final 2011 report containing the UN Guiding Principles, the concept of risk has a central place as a core element of human rights due diligence process. In the Guiding Principles, the process of human rights due diligence is operationalised. Ruggie suggests that human rights due diligence should address adverse human rights impacts (both actual impacts and risks) that a company causes or contributes to directly through own operations, products

and activities, or indirectly through relations with other actors (UNHRC 2011a: 16). Human rights due diligence is largely based on stakeholder engagement, defined as

an on-going process of interaction and dialogue between an enterprise and its potentially affected stakeholders, that enables the enterprise to hear, understand and respond, including through collaborative approaches to their interests and concerns. (OHCHR 2011a: 9)

Importantly, human rights due diligence is not a one-time procedure, rather it is an ongoing process, as human rights risks may change over time.

The four core components of human rights due diligence are: assessment of actual and potential human rights impacts; integration and action upon the findings; tracking of responses; and communication on how the impacts are addressed (UNHRC 2011a: 16). Human rights impact assessment (HRIA) is the initial but a crucial phase. In this phase companies identify and assess any actual and potential adverse human rights impacts with which they may be involved or associated. According to the definition of the International Association for Impact Assessment used in the work of the SRSG Ruggie, impact assessment is “the process of identifying the future consequences of a current or proposed action” (UNHRC 2007b: 3). When applied on human rights, this means identifying both actual and potential adverse human rights impacts of a current or proposed action. HRIA is based on the concept of risk, as future consequences or potential impacts involve a degree of uncertainty, and these possible consequences and their likelihood is what risk assessment process is thought to identify. Ruggie stresses that conducting HRIA is a difficult and subjective exercise (*ibid.*: 5).

Second, integration of and action upon findings is aimed at preventing and mitigating human rights risks and actual impacts, by using the acquired information in relevant internal functions and processes and by taking appropriate action (UNHRC 2011a: 18). Effectiveness of this process depends largely on existence of a comprehensive and well-embedded human rights



policy, and appropriate structure for decision-making and resource allocation within the company (Ruggie 2011b). Knowing what human rights risks the company poses to its stakeholders is only part of the due diligence exercise. What the company actually does about them is crucial for their human rights responsibility. As important decisions about priorities find place in this phase, the issue of subjectivity of judgments is particularly important.

Tracking effectiveness of responses is the third component in due diligence processes that aims at verifying whether and how human rights impacts are addressed (UNHRC 2011a: 19). The Guiding Principles state that the process is based on relevant and appropriate qualitative and quantitative indicators and draws on sources both inside and outside the company, including feedback from affected stakeholders (*ibid.*). This follow-up mechanism allows companies to measure how effective their human rights risk assessment and management mechanisms are.

External communication on how human rights risks are addressed is the last component of the due diligence process. Communication can be done through formal reporting practices or at minimum as a response when concerns are raised by or on behalf of affected stakeholders (*ibid.*: 20). Communicating on progress and remaining challenges ensures transparency and helps companies show that they take necessary steps to respect human rights. When done properly and based on factual information, communication helps companies to gain trust and reduce risks of being accused of human rights violations due to ignorance. However, as will be discussed in chapter 5, communication may sometimes also pose risks to the enterprise. The paradox is that companies, which are open about their social and environmental responsibility endeavours are more often scrutinised and criticised in public than those choosing not to communicate on their corporate social responsibility matters.

The human rights due diligence process is based on the concept of risk in all its core elements. Thus, the central place of the concept of risk in the UN Guiding Principles corporate responsibility to respect human rights is

indisputable. According to the informants from the OHCHR the risk-based approach emerged because it was seen as relevant for the business community. Ruggie drew this conclusion after an extensive research of existing business practices and the broad consultation process (interview, OHCHR 2011b). In the next chapter I analyse why the risk-based approach to corporate human rights responsibility was adopted. In the remainder of the present chapter I discuss how the concept of risk makes human rights due diligence relevant for companies.

## **4.4 Linkages between Business Risks and Human Rights Risks**

The Interpretive Guide emphasises the distinction between human rights risks and business risks (OHCHR 2011a: 8). As argued earlier on, the reason is the importance of focusing on consequences for stakeholders, rather than on risks for the company itself. However, human rights violations are often interconnected with business risks (ibid.: 30). It is increasingly acknowledged that human rights risks have a negative effect on the company's core business because they may undermine company's ability to maximise shareholder value. A company directly or indirectly involved in human rights abuses may face operational, legal, reputational and financial risks.<sup>25</sup> All four types of risk may increase the costs or reduce the revenues for companies, or both. Moreover, all four categories of business risks are interconnected.

### **4.4.1 Operational Risks**

Human rights risks may give rise to operational risks for a company. Operational risk is the type of risk that will disrupt normal everyday activities (Hopkin 2010: 205). Some examples are poor health and safety conditions at the workplace resulting in employee strikes; damage to the property due to

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<sup>25</sup> For a thorough overview and case studies on how various human rights risks are related to business risks, see, for instance, the Human Rights and Business Dilemmas Forum (2011).

rebel groups attacking the company's assets in protest against its operations; business interruption caused by peaceful local community protests blocking the infrastructure and so on. Operational risks, when they materialise, may cause breaks in business operations followed by revenues losses and additional cost. For instance, peaceful community protests against company's activities often result in costly delays. Violent opposition represents in addition a threat to the safety of employees and the material assets of the company.

Not many companies assess the cost of stakeholder-related risks separately, and many simply do not know how much delays caused by workers strikes or protests in local communities actually cost them (Ruggie 2011c). Through a project called "the Cost of Conflict with Communities" Ruggie and his team worked with companies in extractive and infrastructure sectors to understand the price of stakeholder-related risks.

The results of that have been absolutely staggering, not only for us but also for the companies themselves. We find in the oil industry, for example, the amount of time that it takes from the initial stage of getting a permit to drill to the time the first drop of oil comes out of the ground has doubled over the last ten years. That pushes up costs. The single most important factor driving it is community push-back – what is now called "stakeholder-related risk." (ibid.)

Access to water is one issue where human rights risks can represent operational risks for the company. Access to water is connected to such human rights as the right to life, health, food and adequate housing (Human Rights and Business Dilemmas Forum 2012). Almost all business activities depend on water, which has become a scarce resource. Companies can potentially affect the quality of water in the local communities. And some industries do so more than others, e.g. extractive industries and chemical producers.

A case from Peru can help illustrate the relationship between human rights risks and operational risks. In 2011 Newmont Mining, the majority owner of the Yanacocha mine in the region of Cajamarca experienced violent protests against expansion of the mine. In July Newmont received government's approval for the new Conga Mine, gold and copper mining

project, worth 4,8 billion US dollar. But the local community and environmentalist groups protested against the expansion plan because of the potential negative impacts the mining activities would have had on the environment and the water resources in particular (Slack 2012). In October same year Newmont had to halt its operations due to local protesters blocking an access road and setting fire to earth-moving equipment worth 2 million US dollar (Cespedes 2011). The company explained the halt with the need to ensure safety of own employees. The market reacted with sending the stock price of Newmont down (ibid.). Due to continuing violent protests, the Peruvian government temporarily suspended the Conga Mine project development until an independent review of the Environmental Impact Assessment would be undertaken (Rees et. al 2012: 30). As of September 2012, the project is still effectively frozen, and Newmont has no other choice than to dismiss workers from the Yanacocha mine due to decline in production (Newmont 2012). In sum, ignoring the human rights risks to people in local communities posed considerable operational risks followed by economic losses for Newmont.

#### **4.4.2 Legal Risks**

Legal risks arise when a company directly or indirectly breaks the law. For instance, a company clearly runs a legal risk when it breaches the national law in the country of operation. Moreover, human rights violations increasingly lead to legal risks for companies, even where they are not directly involved, but associated with abuses by other actors such as security forces hired to protect employees and material assets. Allegations of complicity are particularly frequent within the extractive industries and the infrastructure sector, and are often associated with violations of such human rights as freedom from torture, cruel, inhuman and/or degrading treatment and punishment.<sup>26</sup>

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<sup>26</sup> Article 5 of the UDHR (1948) and article 7 of ICCPR (1966).

When it comes to the international law, companies can in principle be held legally accountable for wrongdoings.<sup>27</sup> But international human rights treaties generally do not impose direct legal obligations on companies, and legal liability and enforcement are subject to national law provisions (OHCHR 2011a: 11). However, OHCHR underlines that “national law provisions, and some contract provisions reflecting human rights requirements, may result from or be heavily influenced by international human rights treaties” (ibid.). Civil cases against companies in national courts have been proliferating especially during the last decade. With regard to human rights violations by corporations, the most frequently used legislation is the US Alien Tort Claim Act (ATCA). It allows non-US citizens to bring cases against TNCs and seek compensation in US federal courts for violations of international human rights (Jägers 2002: 179-180). The violations can find place outside the US, but the requirement is that the company involved has an office in the US at that point in time when the violation took place. Between 1997 and 2010 more than fifty cases were brought for US courts under the ATCA, most of them containing allegations of complicity in genocide, extrajudicial killings, slavery and torture (UNHRC 2010: 16).

One prominent example of use of ATCA is the case of Unocal<sup>28</sup> in Burma. Unocal was accused of complicity in killings, forced labour, torture and other maltreatments of local people under the construction of the Yadana oil pipeline. The abuses were conducted by the Burmese military forces, which were overseeing and facilitating the construction work. In 1996 the company faced a lawsuit filed by Burmese residents in US federal court under the ATCA, but in 2005 the case was settled outside the court (BHRRC 2012b). Another well-known case under ATCA is *Wiwa vs. Shell*. The case against the Royal Dutch/Shell was filed by the son of Ken Saro-Wiwa, the leader of the MOSOP movement for the rights of the Ogoni people in Nigeria. Shell was alleged complicit in the crimes of the Nigerian government in torturing and

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<sup>27</sup> See for instance Muchlinski (2012: 154-155).

<sup>28</sup> Unocal is now part of the Chevron Corporation.

executing nine MOSOP members, including Saro-Wiwa, in 1995. For many years Shell denied the liability, but in 2009 the company accepted an out of court settlement paying a compensation of US\$15.5 million to the plaintiffs (BHRRC 2012c). As the case was settled outside the court, and Shell did not admit the liability, this lawsuit has limited value as precedent (Tripathi 2012). However, another related case against Shell, *Kiobel vs. Shell*, was recently considered by the US Supreme Court. So far the question is not on the substance of the case, but the procedure, i.e. whether the case could be heard under ATCA. Shell is still fighting to avoid this, as it could set the first precedent in holding companies accountable for complicity in human rights abuses, based on the principle of extraterritoriality.

There is to date no precedent of companies being held accountable for human rights violations under ATCA, and the cases which could potentially create the precedent were settled outside the court. However, the fact that it is in principle possible to hold companies accountable for violations of international human rights is an important argument on which the UN Guiding Principles are founded. Moreover, lawsuits against TNCs lead to considerable costs of legal defence and compensation payments. Legal risks may also keep potential investors away and damage the brand and reputation of companies (Ruggie 2011b).

#### **4.4.3 Reputational Risks**

Human rights risks and actual impacts can potentially damage the brand and reputation of a company. When business get involved in or associated with human rights violations they risk being exposed to scrutiny, negative publicity in media and activist campaigns. Moreover, social media allows negative publicity to reach company's stakeholders quickly. NGO campaigns are not only negative for the brand, they may also be followed by consumer boycotts and divestments, especially by responsible investors. This in turn is likely to affect the financial performance. Nike in the 1990s is a well-known example of this. The connection between human rights risks and reputational risks is

especially relevant for companies who are facing end-consumers directly, e.g. food and beverage producers, electronics manufacturers, and the apparel and footwear industry.

The more visible the company is, the better the chance of stakeholder advocacy – particularly by civil society organizations, will be in generating critical media coverage for a particular group’s efforts, thereby raising risks for the global companies on the other end. (Kytile and Ruggie 2005: 3).

Activist campaign and negative media coverage reflect the gap between the way in which businesses operate and the social expectations of the society.

To illustrate the connection between human rights risks and reputational risks we can look at the issue of health and safety at work.<sup>29</sup> A recent example is the campaign against sandblasting of denim, a technique used in the apparel industry to make jeans look used and trendy. In 2010 the NGO Clean Clothes Campaign started the campaign ‘Stop the Killer Jeans!’. It targets jeans producers who are sandblasting their products, and calls for consumer action against the involved brands. According to the CCC, the process of sandblasting can cause “an acute form of the deadly lung disease silicosis” due to overexposure to the silica dust (Clean Clothes Campaign 2010). Turkey banned sandblasting using silica in 2009, as the health impact on workers in the apparel industry was tremendous (McNeil Jr. 2011). The practice is still widespread especially in low-income countries, such as Bangladesh and Pakistan.

The campaign has given concrete results. Since its launch, a number of large brands, among them Armani, Benetton, Gucci, Levi Strauss & Co, New Look, C&A, H&M and the Varner Group, have publicly banned sandblasting in their production, and are actively seeking alternative ways of ‘distressing’

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<sup>29</sup> The right to a safe working environment is protected by the ICESCR (article 7), and a number of ILO Conventions (ILO Convention No. 152, on Occupational Safety and Health (1979), ILO Convention No. 155, on Occupational Safety and Health (1981), ILO Convention No. 161, on Occupational Health Services (1985), ILO Convention No 170, On Chemicals (1990) and ILO Convention No. 174, on the Prevention of Major Industrial Accidents Convention (1993). The right to health is also set out in the ICESCR (article 12).

jeans (Clean Clothes Campaign 2012). Especially Levi's and H&M are actively advocating a total industry ban, which can also be seen as an effort to ensure a level playing field. After some initial reluctance, Versace chose to "take a more proactive approach and join other industry leaders to encourage the elimination of sandblasting as an industry practice" (Day 2011). There are some companies falling behind as well, e.g. Dolce & Gabbana, who refuses to ban sandblasting in its value chain, taking on a risk of not being prepared in case an all-industry ban will be introduced. However, although the companies are claiming that they have banned the dangerous sandblasting in their production, in practice it is a challenge to ensure compliance throughout their complex supply chains, which include many sub-suppliers and, potentially also so-called 'shadow factories'.

#### **4.4.4 Financial Risks**

When revealed through 'naming and shaming' by human rights activist and the media, human rights risks of companies can potentially lead to financial risks. The terms financial and economic risks are sometimes used interchangeably. Here I use financial risks in a narrow sense of investments, while economic risks refer to a broader concept. As defined by Kytle and Ruggie (2005: 6) economic risks are associated with "maintaining profits, sustaining economic growth and protecting investments and shareholder value from market fluctuations."

Divestment by financial actors, such as banks and institutional investors, means reduced access to capital for companies. It is true that many mainstream and short-term investors are not concerned with CSR profiles of companies they place their money in. Meanwhile, large financial institutions increasingly demand CSR related information about companies they invest in, e.g. environmental, social and corporate governance (ESG) performance data. This idea is based on the concept of corporate sustainability that initially implied ability of a company to sustain its business approach in the long run given its impact on the environment (Bernstein 2008: 2). Later this thinking



was applied more broadly on ESG issues, including human rights and labour practices. There are a number of international standards for responsible investment, such as the UN-backed Principles for Responsible Investment (PRI), the Equator Principles and the IFC Sustainability Framework including IFC's own Policy on Environmental and Social Responsibility, and the Performance Standards on Environmental and Social Sustainability defining the client's responsibility in managing environmental and social risks.

To illustrate the relationship between human rights risks and financial risks, we can look at the case of Wal-Mart and the Norwegian Government Pension Fund Global's (GPFG), the world's largest sovereign pension fund. The GPFG has developed ethical guidelines for exclusion of irresponsible companies. Among the criteria for exclusion is contribution to violation of human rights. In 2006 the GPFG divested from Wal-Mart based on comprehensive evidence of severe and systematic human rights and labour rights violations (Ministry of Finance 2006). Wal-Mart is a US multinational company, the world's largest retailer and the third largest global company.<sup>30</sup> According to the Council on Ethics of the GPFG, human rights violations of Wal-Mart included direct adverse impacts in its operations in North America, such as discrimination against women in the hiring processes, use of child labour in the workforce, employment and exploitation of illegal migrants, and unfavourable working conditions in general. In addition, Wal-Mart was found responsible for contributing to human rights violations indirectly through its supply chain in Asia, Africa and Latin America. The instances included child labour, unsafe working conditions and extensive working hours, remuneration under the minimal wages in respective countries, prohibition of association, excessive punishment and forced labour (Council on Ethics 2005). Before the decision to divest was taken, Wal-Mart was confronted with the evidence and asked to alter the practices (Ministry of Finance 2006). However, as Wal-Mart failed to reply, the divestment decision was made pulling out around NOK 2.5 billion, around 417 million US dollar. More recently the Netherland's pension

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<sup>30</sup> According to the Fortune Global 500 list for 2012 (CNN Money 2012).

fund, which is also seen as a responsible institutional investor, has also pulled its investment out on the similar grounds (Shapiro 2012).

All four types of risk, operational, legal, reputational and financial have potential of leading to economic risks for companies. As discussed above operational disruptions in production often mean temporary loss of income and higher costs due to reparations, compensations and enhanced security expenditures. Legal liability and negative publicity may also lead to economic risks for companies. Lawsuits are not only costly; they also negatively affect the brand and reputation, and may result in reduced market share, lower stock price and divestment by responsible shareholders. Especially for business-to-consumers type of companies, activist campaigns and consumer boycotts pose great risks. As involvement in human rights abuses represents economic risks for companies, there is an economic rationale for human rights risk assessment and management, which makes human rights due diligence relevant for companies.

## **4.5 Concluding Remarks**

The concept of risk as it is applied in the UN Guiding Principles has two different meanings: business risks associated with human rights violations and, most importantly human rights risks that corporate activities pose to their stakeholders. The concept of risk emerged gradually throughout John Ruggie's mandate, based on the understanding that human rights risk assessment and management was relevant for companies and that human rights due diligence would appeal to the business community. However, it was central to emphasise the crucial difference between the traditional and narrow commercial due diligence and human rights due diligence, i.e. the focus on risk to stakeholders and not primarily the shareholders. As discussed in this chapter, human rights risks are often interconnected with business risks. It is increasingly acknowledged that human rights risks have a negative effect on

the company's bottom line because they often materialise in form of additional costs and have a negative effect on company's ability to maximise shareholder value. The links between human rights risks and business risks constitute the business case for human rights due diligence, which is discussed in the following chapter.

## **5 Promoting Corporate Human Rights Responsibility**

The previous chapter was concerned with the way the concept of risk is applied in the UN Guiding Principles. In the present chapter I address the second part of the research question, discussing why the risk-based approach to corporate human rights responsibility was adopted in the Guiding Principles. I argue that the risk-based approach was the core mechanism both in the process of adopting the Guiding Principles and in laying the strategy for future promotion and implementation of corporate human rights responsibility. However, the risk-based approach also offers a number of challenges, which need to be addressed in order to ensure the effectiveness of human rights due diligence in practice.

### **5.1 The Risk-based Approach**

#### **5.1.1 In the Spirit of Principled Pragmatism**

As mentioned before, the principled pragmatism approach of John Ruggie implied striking a balance between the overall aim of effectively protecting human rights from business-related harm, and the feasibility based on the understanding of what can possibly achieved today.<sup>31</sup> Introducing the risk-based approach was part of the second element. It was crucial to adopt an approach, which would be supported by stakeholders of the UN process, not least by the business community and civil society, and make endorsement of the UN Framework and the Guiding Principles possible.

First, the focus on risk assessment and management facilitated acceptance of corporate human rights responsibility by stakeholders from the business community. The OHCHR human rights and business expert Lene Wendland recalls:

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<sup>31</sup> I address these elements in the reverse order, due to the structure of my argument.

The idea was to introduce an approach that builds on what business could use, including concepts and methodologies familiar to them, in order for companies to realise that corporate responsibility to respect human rights is something that they can do, and not something that is completely different and separate from their existing practices. (interview, Wendland 2012)

The concept of risk was introduced partly because the SRSR Ruggie and his team wanted to use the language that business actors were familiar with to make the Guiding Principles more appealing to them. Risk management was viewed as part of core business thinking, and through human rights due diligence, it gained a central place in the UN Guiding Principles. This is an immediate explanation and justification for using the risk-based approach, which was given by all informants in this research project, and supported by the findings from the document review.

The reasons for adopting the risk-based approach go deeper. I believe that the risk-based approach replaced the normative approach, which characterised the predecessor of the UN Guiding Principles, the UN Draft Norms. In chapter 3 I argued that the ethical dimension is not present or explicit in the Guiding Principles.<sup>32</sup> The absence of a normative argument in the Guiding Principles is also part of the principled pragmatism approach of John Ruggie. This was crucial for moving forward in the previously stalled debate. Instead of building on a moral argument that corporate human rights responsibility is something companies should do based on ethical considerations, the argument in the Guiding Principles is based on self-interest of business in managing business risks caused by adverse human rights impacts.

It should be noted, however, that the business community's acceptance of the UN Framework and the Guiding Principles might also in part be attributed to the non-binding character of the norms. It is easier to accept business and human rights norms, which a company cannot be held legally

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<sup>32</sup> See sub-section 3.1.3.

accountable for. Another point when looking at the success of the Guiding Principles is that one also should take into consideration the fact that main responsibility to *protect* human rights still rests on the governments and not on business actors. This was not the case in the UN Draft Norms, which placed almost equal responsibilities on both. By emphasising that the baseline for corporate responsibility to *respect* human rights is the principle ‘do no harm’,<sup>33</sup> Ruggie bypassed the dilemma of imposing the role and responsibilities of governments on corporate actors.

Being accepted by the business community was a major concern for John Ruggie in developing the UN Guiding Principles, but it was not the only concern. Second important group of stakeholders of the Ruggie-mandate was civil society. In the business and human rights debate NGOs tend to focus mainly on the issues of accountability and remediation. Responsibility for providing adequate remedy is addressed in the third pillar of the Guiding Principles. When it comes to accountability mechanisms, human rights due diligence does not in itself ensure such mechanisms. Getting NGOs and human rights activists on board required emphasising that the Guiding Principles are aimed not only at addressing actual human rights violations, but also at preventing human rights abuses from happening in the first place through the mechanism of human rights due diligence. Once that was clearly understood, there was no opposition to the risk-based approach among the civil society representatives either (interview, Wendland 2012).

The principled pragmatism approach is a sophisticated strategy that has helped to overcome many of the barriers that previously blocked the business and human rights agenda from moving forward. Corporate responsibility to respect human rights is developed based on understanding of what is possible to get businesses to accept and adopt already today. At the same time, it is laying the groundwork for further promoting corporate human rights responsibility.

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<sup>33</sup> recall the ‘negative duty’ discussion in 3.1.2

### **5.1.2 From Shareholder Risks to Stakeholder Risks: a Paradigm Shift?**

The Guiding Principles, are build on the idea that it is in the self-interest of business to implement human rights due diligence, because the process helps companies to better manage human rights risks and avoid or minimise business risks related to them. Stakeholder engagement is an important source of information on human rights risks. The Interpretive Guide stresses that stakeholder engagement is an advantage for business because it helps managers to get a better understanding of the context, in which the company operates, find out what risks there are and whether stakeholders have the same or different perspectives on what impacts the company has on their human rights (OHCHR 2011a: 20, 40).

According to the stakeholder theory, as discussed in chapter 3, for a company to sustain its profits in the long run, all legitimate interests of its stakeholders should be addressed. In practice, this is arguable. I believe that this argument is more valid the closer the stakeholder interests are to the inalienable human rights. It is also more realistic to expect companies to systematically address such interests and accept them as responsibilities of the company, than other less urgent claims by stakeholders. Moreover, to be realistic, one has to acknowledge that in the business world, paying solid dividends to shareholders is a central concern. The shareholder value approach is embedded in the corporate law in a great number of countries and the notion of fiduciary duties of managers towards owners or shareholders has a strong standing. Especially for public companies, which report quarterly, the short-term profitability concerns often overshadow the long-term sustainability considerations. For most companies shareholders are seen as those without whose support the firm would faster cease to exist. Therefore, shareholder interests often have more power to influence management decisions when assessing projects or practices with high human rights risks but also potentially high profits.

The task of the follow-up mandate of the Working Group is to alter the traditional business view based on predominance of shareholder interests, and secure a permanent shift towards a broader stakeholder responsibility approach. Applying the familiar to business mechanism of risk assessment and management on human rights while stressing that the focus should be on risks to stakeholders, the Guiding Principles broaden the horizon of corporate due diligence. Muchlinski argues, that operationalisation of corporate responsibility to respect human rights will mean a “departure from a shareholder based corporate governance model towards a more stakeholder based model” (Muchlinski 2012: 167). Hence, if widely implemented by companies, risk-based human rights due diligence will represent a paradigm shift from shareholder value approach to a broader stakeholder responsibility approach. Shareholders become one among various stakeholder groups, such as employees, customers, business partners, local communities, and so on. Such paradigm shift in business is crucial for achieving the aim of the Guiding Principles, which is reducing corporate human rights harm.

## **5.2 Business Case for Human Rights Due Diligence**

I have so far discussed how the risk-based approach relates to the second element of Ruggie’s principled pragmatism, i.e. the need to start with what is feasible to achieve today. The first element, the overall aim of effectively protecting human rights of stakeholders from business-related harm, is a long-term objective. But the preliminary strategy of the UN Working Group is already pointing at how this aim will be sought in the follow-up mandate. In my view the central components of the strategy with regard to the second pillar of the UN Guiding Principles, reflect the three-fold foundation for corporate responsibility to respect human rights: the evolving international law; the well embedded social expectations; and the economic rationale for risk management. In chapter 3 I connected these components to three of the four theoretical dimensions of CSR, which are explicitly addressed in the



Guiding Principles: political, integrative and instrumental. In the following I argue that the economic rationale for risk management constitutes the core of the business case for human rights due diligence, the other two components are part of the strategy for reinforcing the business case and making sure that it is increasingly relevant for all companies, which in one or another way face human rights risks.

### **5.2.1 Economic Rationale for Risk Management**

Promoting the business case for corporate human rights responsibility is one of the central tasks of the UN Working Group. Their notion of the business case includes both opportunities to reduce costs and to make business more sustainable in the long run. The cost-reduction part of the argument is based on the growing evidence that a failure to address human rights risks and impacts leads to significant operational, legal, reputational and financial risks (UNHRC 2012: 14). With regard to the issue of long-term sustainability the Working Group members stress that “implementing the Guiding Principles can serve as an integral component of long-term value creation, corporate citizenship and business sustainability” (ibid.).

First, it is argued that human rights due diligence is good business risk management, “it helps protect business value by maintaining reputation, avoiding strikes, boycotts and protest, and prevents disputes from becoming costly law suits or damaging public campaigns” (Business & Human Rights Initiative 2010: 6). In an article advocating CSR as a model for risk management for multinational companies, Ruggie and Kytle argue that CSR programs are “an effective means to provide strategic intelligence for managing social risks” (Kytle and Ruggie 2005: 4).

CSR, particularly for a global company, is related to corporate risk management through two means: by providing intelligence about what those risks are, and by offering an effective means to respond to them. The key to both, [...], is more effectively “managing stakeholder relationships.” (ibid.: 9)

Similarly, corporate human rights responsibility operationalised through human rights due diligence works as such strategic intelligence; it helps corporate managers to map out human rights risks and respond effectively to them, while engaging in a meaningful dialog with the stakeholders.

Ruggie argues that in some industries stakeholder-related risks are the largest category of non-technical risk for companies, but many do not have adequate systems or tools to measure and manage them (Ruggie 2011b). In order to see the relevance of human rights risk assessment and management for the bottom line, it is useful to aggregate the costs of human rights related risks. It is not a common practice to add up all stakeholder-related costs in an aggregated post in a company's financial statement. Such costs are more likely to be included in project specific operational costs, and not specified as stakeholder-related ones. The SRSG asked some companies to look at this issue and identify the cost of operational delays due to boycotts, road blockages, or even attacks by local communities damaging their assets such as pipelines etc.

The irony is that companies didn't know the answers to those questions because the costs are borne by individual business units and absorbed as operating costs. They're never aggregated, and so senior management never sees them as a single total. We had one company report to us that over the course of a two-year period they lost \$6.5 billion to stakeholder-related risk. This was at a time when their annual profit was \$20 billion. (Ruggie 2011c)

Such aggregation of stakeholder-related costs could create a powerful incentive for company's management to adopt human rights due diligence.

Second, corporate human rights responsibility based on due diligence and stakeholder engagement helps companies to create long-term value for stakeholders, become a better corporate citizen, and ensure business sustainability in the long run. The second part of the business case argument, as I see it, is an extension of the first one. It is based on a long term perspective and stresses the advantage for business in being ahead of the developments in the field of business and human rights, for instance towards

more legal accountability and stronger social expectations. This is an important perspective in terms of sustainability of the company in the long run. However, I believe that for most companies the business case based on short-term risk management and cost reduction is still the most relevant argument. For many companies there is a link between human rights risks and business risks, and this link constitutes the basis for the business case for human rights due diligence. However, the relationship between the two levels of risk is not straightforward.

### **5.2.2 Business Case: a Critical View**

There are at least three critical points with regard to the risk-based approach to corporate human rights responsibility. First, for some companies, human rights risks may not pose any (significant) business risks, at least in the short run. This means that Ruggie's argument for implementing corporate responsibility to respect human rights through the risk-based approach may not be relevant for all companies. Wendland points out that in many cases creating risks to human rights does not necessarily need to represent a risk to business.

[...] despite what we want to believe, in many cases it is actually a much better business, at least in the short term, [...] to violate human rights: not to pay a proper wage, not to respect labour rights and not to pay for proper disposal of waste, [especially when companies operate] in an environment where there is no regulation [...]. So you can pose severe risks to human rights without facing any other traditional business risks. (interview, Wendland 2012)

Governance gaps, corruption, absence of independent media, suppression of NGOs, among other factors contribute to permissive environment for human rights abuses by companies without being a risk to their profitability, at least in the short run.

Second, although human rights risks would pose business risks to a company, the business risks may be seen as relatively low for managers to do

anything about the related human rights risks. Many companies still prefer to take the business risks, rather than introduce costly measures and systems to avoid or mitigate human rights risks. Especially SMEs compared to large TNCs are more likely to see the costs of such measures as too high. Moreover, human rights due diligence is likely to be viewed as more relevant by those companies, which are exposed to public scrutiny and are more dependent on public acceptance. As mentioned, business-to-consumers companies are more exposed to reputational risks because they are more dependent on the public opinion and the good will of consumers. TNCs with big brand names are also more likely to face great business risks if they are associated with human rights abuses, than the less known to the broader public companies, which tend to stay below the radar. Big brand names scandals are easier to draw attention to in the media. However, NGOs and the media are not present everywhere. Instances of human rights abuses happening in remote regions of developing countries may therefore stay unreported, even when large TNCs are involved.

The difference in relevance of human rights due diligence was also evident from the stakeholder consultations process conducted by the SRSG. According to Margaret Jungk from the Working Group, multinationals with renowned brand names were overrepresented in the process and there was clearly a bias towards companies with potentially large societal and environmental footprints, in particular the extractive sector and the pharmaceutical industry firms (interview, Jungk 2012).

Third, although managers would see the link between human rights risks and business risks and act upon them, they might prioritise those human rights risks that in their view pose the highest business risks, and pay less attention to human rights violations, which pose low risks to the company itself. For instance, such human rights risks as use of child labour and sweatshop practices tend to receive more attention from companies, as they have caused many scandals in the media; while freedom of association may not be prioritised. Although the lack of freedom of association is an underlying problem in many developing countries and is one of the main barriers on the

way towards better working conditions, it is not given much attention to in the media nor by companies (interview, Hoffmann 2012). The Guiding Principles and the Interpretive Guide presume that severity of the consequences to stakeholders and not to the company should be decisive in human rights risk management. Prioritising which human rights risks to address based on what business risks they pose to the company would apparently be a misuse of human rights due diligence. Promoting corporate human rights responsibility through the risk-based approach one should keep in mind that the strength of the link between human rights risks and business risks vary from one type of human rights to another, and from the traditional risk assessment and management perspective not all human rights would be addressed by companies.

The Guiding Principles aim at altering this traditional view and making companies see that human rights risks merit separate attention even in situations where there are no significant and immediate business risks associated with them. As human rights risks are primarily risks to stakeholders, not companies, and as business can potentially impact on all human rights, companies should consider all of them in their own right. Such shift in corporate mindset is likely to take long time. The success will largely depend on additional efforts, including those, which are aimed at enhancing accountability mechanisms and raising social expectations to reinforce the business case for human rights due diligence.

### **5.2.3 Enhancing Accountability**

The business case for human rights due diligence can be reinforced through enhanced accountability for companies involved in human rights abuses. Enhancing accountability is a major strategic task of the UN Working Group in the follow-up mandate (UNHRC 2012: 13). Although providing adequate judicial and non-judicial means for corporate accountability is part of the government's duty to protect, there is another way for the UN Guiding Principles to move from the level of expectations towards the level of

accountability through incorporation of the norms into existing national, regional and international accountability mechanisms. The Working Group is seeking to embed the Guiding Principles in regional and international agreements and institutions, industry associations, and responsibility, sustainability and investor ranking indices (ibid.: 17).

The Guiding Principles are already embedded in the global governance framework for corporate social responsibility through the revised OECD Guidelines for MNEs, the renewed EU strategy for CSR, the ISO 26000 Guidance on Social Responsibility and the IFC Sustainability Framework and Performance Standards. The Guiding Principles are also supported by the UN Global Compact. Most of the above mentioned frameworks are norms or guidelines, but the OECD Guidelines also require establishment of grievance-mechanisms at the national levels in all member countries. These are the National Contact Points (NCPs), which handle complaints against companies alleged in breaching the Guidelines in their global operation. The OECD Guidelines now state that companies *should* “avoid causing or contributing to adverse human rights impacts” and “carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed” (OECD 2011: 20). NCP is not a legal body, but a complaint against a company may create reputational risks for the company and imply additional costs of negotiations between the complainant and the company.

Although global governance frameworks, including the UN Guiding Principles are not legally binding and do not include legal accountability mechanisms, they are regarded as soft law. Furthermore, they form the basis for social expectations towards business conduct. Over time non-binding global governance mechanisms have a potential to develop into hard law. The UN Guiding Principles may also be incorporated into legally binding accountability mechanisms, for instance if states use the Guiding Principles as the basis for new regulations. One example is the US Dodd-Frank Wall Street

Reform and Consumer Protection Act signed into law in 2010, where section 1502 requires companies sourcing any of the so-called ‘conflict minerals’ to conduct human rights due diligence and report on all steps taken to ensure that their products do not fuel the conflict in the Democratic Republic of Congo (DRC) (Lehr 2010). Another, also US example is the California Transparency in Supply Chains Act of 2010 requiring companies to disclose the efforts to ensure zero slavery and human trafficking in their supply chains (Altschuller 2010). For companies such developments would mean that human rights risks would inevitably represent higher legal risks.

The SRSG Ruggie states that appropriate human rights due diligence may help companies to avoid risk of facing costly lawsuits, based on the fact that they took “every reasonable step to avoid” causing or contributing to human rights violations (UNHRC 2011a: 17).

Conducting due diligence enables companies to identify and prevent adverse human rights impacts. Doing so also should provide corporate boards with strong protection against mismanagement claims by shareholders. In Alien Tort Statute and similar suits, proof that the company took every reasonable step to avoid involvement in the alleged violation can only count in its favour. (UNHRC 2010: 17-18)

Although a properly conducted and documented due diligence process can potentially improve the company’s position in case of a lawsuit, human rights due diligence in itself is not an automatic guarantee against legal liability in human rights abuses.

One potential challenge with regard to human rights due diligence and accountability for business, discussed during the Ruggie’s mandate was the danger of increased legal risks for companies that communicate about their human rights risks. It was asserted that companies that disclose human rights risks information give external actors the opportunity to use the information against them (UNHRC 2009: 19). Indeed, the paradox of corporate responsibility and sustainability reporting is, as briefly mentioned before, that companies, which talk openly about their social and environmental challenges

and efforts, become easy targets for media and activist campaigns. This increases first and foremost their reputational risks. While companies that choose the path of non-communication and ‘business as usual,’ may not attract any attention. This creates disincentive for many companies to disclose too much, if any, information on human rights risks.

The SRSG argues that there are two ways for legal liability to flow from human rights due diligence and communicating on findings:

In the first, the company gains knowledge of possible human rights violations it may commit or be involved in, does nothing to act on it, the violations occur, and word of the company’s prior knowledge gets out. In the second, the company publicly misrepresents what it finds in its due diligence and that fact becomes known. (ibid.: 20)

He adds that if it is done properly and in good faith, human rights due diligence should create opportunities to manage risks and to engage in meaningful dialog with stakeholders “so that disingenuous lawsuits will find little support beyond the individuals who file them” (ibid.: 20). The purpose of conducting human rights due diligence is to detect human rights risks and act upon the findings in order to avoid or mitigate the risks, not to ignore or misrepresent the information. In other words, it is crucial how the company responds to the information gained from the due diligence process.

#### **5.2.4 Raising Social Expectations**

In addition to enhancing accountability for adverse human rights impacts, the business case for human rights due diligence may be reinforced through raising social expectations for corporate human rights responsibility. In the preliminary strategy, the Working Group underlines that “to promote dissemination and implementation most effectively, there is a need to cultivate an environment conducive for the uptake of the Guiding Principles” (UNHRC 2012: 12). This also implies the need to educate stakeholders about their rights



and reinforce the social expectations towards both states and businesses with regard to their respective duties and responsibilities.

It is a basic expectation of the society as a whole that companies respect human rights (*ibid.*: 14). However, to promote wide implementation of human rights due diligence by companies, this social expectation would need to be expressed more clearly and consistently. Disseminating and promoting the UN Guiding Principles among a great variety of stakeholders, e.g. workers, trade unions, consumers, civil society, and investors represents an important socialisation process. This means that the UN Guiding Principles would become norms, a common understanding about what is appropriate business behaviour with regard to human rights in a wider audience than what is the case today.

Social constructivism scholars of international relations, Risse and Sikkink (1999: 11) suggest that a socialisation process leads to changes in identities, interests, and behaviours. John Ruggie himself is one of the pioneers of the contemporary constructivist theory in international relations, a tradition focusing on how identities and interests are shaped by shared ideas and norms. When asked about the theoretical foundation for his work with the UN Guiding Principles, he states that it is “a combination of embedded liberalism, the global public domain, and how norms emerge, take root and disseminate”.<sup>34</sup> Hence, Ruggie confirms that social constructivism ideas have influenced his approach. Then his approach implies a theoretical assumption about identities, interests and relations being socially constructed. It could be an interesting topic for future research to look at the implementation of the Guiding Principles in the light of the constructivist approach, as opposed to the realist one. It would also be useful to look at how behaviours and cultures in companies change (or not) when the UN Guiding Principles are being implemented, but this lies outside the scope of this thesis. It is relevant to note here that the socialisation process is by Ruggie thought to be an important dynamic for the future promotion and implementation of the Guiding

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<sup>34</sup> E-mail correspondence with John Ruggie through OHCHR, 5 December 2011.

Principles. Activating the demand among key stakeholders of companies for implementation of human rights due diligence, would be a powerful driving force for corporate human rights responsibility. The socialisation process could therefore reinforce the business case for human rights due diligence, as raised social expectations would imply increased level of all types of business risks for irresponsible companies, operational, reputational, legal, financial and, ultimately, economic.

### **5.3 Remaining Challenges**

I have so far in this chapter identified a number of potentials for the risk-based approach to promote corporate responsibility to respect human rights. In the remainder of the chapter I discuss the main challenges of the risk-based approach, which were identified during this study.

#### **5.3.1 Challenges of Human Rights Risk Assessment**

A company, as any organisational entity, is a complex system of people and structures, which exists and functions within even more complex contexts of host countries and national and international markets. Most companies are part of global value chains. Kytte and Ruggie argue that one of the central aspects of the global operating environment is the networked nature of business operations with numerous stakeholder groups (Kytte and Ruggie 2005: 2). This network structure of companies makes it a challenge to have full control over all relations and practices.

Networks, by their very nature, involve divesting direct control over significant operations, substituting negotiated relationships for hierarchical structures. Therefore, gone are the days when companies could easily identify the starting and end points of their value chains and hope to manage them as a closed system. (ibid.)

Complex systems such as companies operating in a networked manner are in addition non-stationary, which means that outcomes are less predictable and sometimes even less imaginable (Randall 2011: 104).

Internal culture of an organization and the environment it operates in both affect how risks are perceived and what is being done about them (Waring and Glendon 1998: 68). For large TNCs there is also a challenge of different risk cultures between headquarters of the company and its business units. Furthermore, mergers and acquisition represent a challenge because organisational culture does not change quickly.

Whereas authority power of senior managers may impose some changes relevant to culture, it is unlikely to be able to enforce a lasting change on an inner context of conflicting sub-cultures, especially where local group values differ markedly from those of senior management. (ibid.: 76)

Introducing new structures and policies may be a rapid process, but cultural changes take long time and need an active follow-up process.

I argued previously that human rights risks are better described as uncertainties. And as noted by Ruggie, conducting HRIA is a difficult exercise based on subjective judgements (UNHRC 2007b: 5). Therefore there is a need for a conceptual discussion on risk when applied to human rights and business. The guidance on how to assess human rights risks is still rather limited. The Guiding Principles outline the main components of human rights due diligence but leave it up to companies to define the risk assessment and management framework. There is no discussion on a more technical level on how to conduct human rights risk assessment in practice.

During the first session of the Working Group the need to develop a proper methodology for human rights due diligence was frequently expressed by a number of speakers representing both businesses and civil society (observation, Working Group 2012). A methodology includes a set of principles, rules and methods or tools that together constitute general guidance in answering a given question. The Guiding Principles address the former two,

while developing more specific methods and tools is part of the follow-up mandate of the Working Group. A number of stakeholders encouraged the Working Groups to elaborate further on the methodology of due diligence, establish effectiveness criteria and ensure the consistency of approaches (observation, Working Group 2012, GBI 2012). It may be inferred that there is inadequate understanding of how human rights risk assessment and management ought to be conducted in practice.

In contrast, some other stakeholders stressed that human rights due diligence is no ‘one size fits all’ process, and should therefore not be standardised (ICC, IOE and BIAC 2011). In other words, advocates of a flexible approach to implementing human rights due diligence stress that each company needs to find an approach to human rights due diligence that works well within the company structure and its operational context. The Guiding Principles in fact underline that they are not developed as a tool kit that can be taken off the shelf and applied to any company. Although the Guiding Principles themselves are universal,

the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises. (UNHRC 2011a: 5)

When it comes to ways of and means for implementation, one size does not fit all. Jungk argues that companies have many different types of sophisticated complex business management systems, which make it difficult to standardise human rights due diligence processes (interview, Jungk 2012).

The first chair of the Groups, Margaret Jungk agrees that there is a need to further clarify the concept of risk and risk assessment when applied to human rights.

I think we do need to bore down one more level in terms of what risk actually is and how companies look at it, because right now in terms of methodology, there still is a question mark hanging over how you determine things like likelihood and severity, and how you take into account the numbers of people affected

versus the spread of the impacts, whether it is one group that bears the consequences or whether these consequences are spread throughout the population. All these kinds of things are left up in the air and they shouldn't have to be decided by companies. I think we could add one level more of clarity in terms of what should be looked at in relation to risk [...]. (ibid.)

Jungk is saying that risk assessment methodology should not be decided by companies alone. Most companies are not human rights experts, therefore it is important for successful implementation of the Guiding Principles that additional guidance on how to define human rights risks and how to conduct proper and effective human rights due diligence is needed. Jungk adds that in the Guiding Principles the concept of risk is too high-level, it is “too esoteric still for companies to deal with” (ibid.). The Interpretive Guide makes it clear that in human rights risks severity is the key component, while likelihood can be used as guidance to prioritise risks, but this is not sufficient as guidance on how to assess human rights risks in practice.

### **5.3.2 Identifying Legitimate Stakeholders**

The second major group of challenges is concerned with stakeholder engagement. To know what human rights risks you as a company pose, you need to know your stakeholders. Moreover, it is not only important to know who they are, but also engage in a meaningful dialog with them in order to understand their concerns. Global value chains include multiple companies and supply chains, and they stretch across large geographic areas with different cultures and perspectives on human rights and corporate responsibility. When the network grows to include new stakeholders, identifying stakeholders, finding legitimate representatives and managing all relationships becomes increasingly difficult.

Identifying legitimate stakeholders and representatives is an uneasy exercise. Especially for new projects, identifying all potentially affected stakeholder groups is a challenge. Own employees and closest business

partners are no doubt relevant stakeholder groups. Further down the supply chain it may become more difficult to get a complete overview. Local communities are also relevant stakeholder groups, but they are rarely homogenous. They consist for instance of different ethnic or religious groups and may be highly diverse and even in conflict with each other. This raises the question of representation. For instance, Shell initially failed to acknowledge MOSOP as a representative for the Ogoni people stakeholder group.

Shell questioned MOSOP's claims and went to considerable lengths to point out that MOSOP was not a legitimate stakeholder and that its ability to represent the Ogoni was questionable. This experience provides a powerful illustration of the potentially flawed nature of company-centric processes used to define stakeholder groups. Sometimes inconvenient stakeholders may be ignored in the hope they will eventually lose their influence. (Wheeler et al. 2002: 303)

On the contrary, MOSOP did not lose its influence, but fought for recognition as legitimate representatives until they succeeded helped by Amnesty International and Greenpeace. In other cases, stakeholder groups may be reluctant to engaging in dialog with companies, or even refuse to talk. Indigenous peoples have often chosen the path of violent conflict to force companies leave their territories. Moreover, reaching out to marginalised and vulnerable groups may also be a challenge. For instance, migrant workers might be afraid of speaking up for their rights, especially if they are illegal migrants.

In the UN Framework corporate responsibility to respect human rights is defined within the company's sphere of influence. Originally, the concept of sphere of influence was introduced in the UN Global Compact. The model consists of concentric circles where the workplace is situated at the centre of the sphere, while supply chain, market place, community, and government follow in this order as layers of an onion, moving further away from the core. According to John Ruggie, this model implied an assumption that the "influence", and thus presumably the responsibility, of a company declines as

one moves outward from the centre” (UNHRC 2008c: 4). The UN Framework stresses that corporate responsibility to respect human rights is not based on degree of *influence*. Rather, its scope depends on actual and potential human rights *impacts* of companies, both in their own activities and in relations with other actors (UNHRC 2008a: 20). In order to avoid the ambiguity, the sphere of influence model was not applied in the Guiding Principles. However, it could be a useful starting point for companies in the process of identifying major groups of legitimate stakeholders. Furthermore, engaging with one group of stakeholders, a company may identify other affected groups, a so-called snowballing technique frequently used for identifying key informants in social science fieldwork.

### **5.3.3 Navigating through Stakeholder Demands**

In terms of addressing legitimate claims, stakeholder engagement is also potentially a challenge for business because some stakeholders might use the opportunity to ask companies to move beyond the responsibility to respect human rights and take on a more proactive social role, for instance, through building schools, hospitals, infrastructure, etc. In some cases there are operational reasons for meeting stakeholders’ demands, e.g. in order to maintain good relations and avoid stakeholder-related risks and costs. However, in order not to become entrapped in endless stakeholder claims, the distinction between company’s human rights responsibility and social license to operate is important to maintain. To meet the latter, a company may be asked for example to build a school, while for the former, what is essential is – to use the same example – to refrain from blocking the access to existing school by a pipeline or similar. The Guiding Principles attempt to create this common understanding among stakeholders about what is realistic to require from business. This way companies can start stakeholder engagement with a clear baseline of what can be expected from them and not become hostages of inflated expectations and demands of stakeholders. As was discussed above, it is an important task of the Working Group to disseminate the Guiding

Principles widely at the grass-root level in order to ‘socialise’ stakeholders and inform them on what reasonable expectations they can have towards business actors.

A major challenge for a responsible company is when human rights-related demands from different stakeholder groups are in conflict with each other. The SMSG stresses that one of the toughest dilemmas is when the national law contradicts international human rights. The Guiding Principles emphasise that business should respect human rights as if it was hard law no matter where they operate. This means that managers would have to find a way to meet responsibility to respect human rights without violating the national law. For instance, in Saudi Arabia trade unions are banned. The Labour Code does not give workers the right to create unions, bargain collectively or go on strike (International Trade Union Confederation 2011). Sanctions include dismissal and imprisonment. When freedom of association is prohibited,

some [companies] have encouraged workers to form their own representation within the company and facilitated elections of workers’ representatives. Efforts have also been made to provide education on labour rights and train local management on how to respond constructively to worker grievances. (UNHRC 2009: 17)

However, on a broader scale these types of conflicts between stakeholder claims are not easily resolved by companies alone. They require collective efforts from civil society and the international community in promoting respect for international human rights norms in all states.

In practice, trade-offs between conflicting human rights demands of stakeholders may be unavoidable. Often, limited time and resources will not allow companies to address all stakeholder demands at once and less urgent human rights impacts and risks would have to give way to the most severe ones. Moreover, some human rights will be more relevant in certain sectors and operational contexts and will therefore get more attention by companies



(Ruggie 2011b). For instance, indigenous peoples rights would be high on the agenda in many mining companies. The ideal of the stakeholder theory in balancing all stakeholder demands without making trade-offs does not seem to be realistic. Prioritisation of human rights risks is difficult but inevitable. And it is even a greater challenge to be aware of all legitimate stakeholder groups and all human rights risks to balance between.

## **5.4 Concluding Remarks**

The risk-based approach in the UN Guiding Principles reflects the principled pragmatism approach of John Ruggie. It was adopted in order to make the Guiding Principles relevant and appealing to businesses, based on the understanding of companies' self-interest in risk management. The shift of focus from the traditional shareholder risks approach to the broadened stakeholder risks approach is crucial for achieving the ultimate goal of the Guiding Principles, which is to minimise corporate related human rights harm. I argue that it is important to stress that there are links between business risks and human rights risks in order to promote corporate human rights responsibility through building the business case for human rights due diligence. John Ruggie laid the groundwork for the business case based on interconnectedness between the two levels of risk and developed a strategy for reinforcing the business case through enhancing accountability and raising social expectations for corporate human rights responsibility. However, there are quite a few remaining challenges to be addressed in the follow-up mandate of the UN Working Group. Among these are the complexity of human rights risk assessment and the need for a coherent methodology to guide the process and ensure its effectiveness; and the challenges of stakeholder engagement including identifying legitimate stakeholders and balancing conflicting stakeholder claims.

## 6 Conclusion

This thesis has offered a qualitative in in-depth analysis of the meaning and the role of the concept of risk in the context of the UN Guiding Principles on business and human rights. The question was how the concept of risk is applied in the UN Guiding Principles, and why the risk-based approach was adopted. The theoretical underpinnings of CSR, in particular the shareholder value theory and the stakeholder theory were used to establish the theoretical and conceptual framework for this research project. These two theories and especially the contrast between them informed my understanding of the central issues and tensions in the process of developing the Guiding Principles and helped to better understand whether and how the risk-based approach could contribute to promoting corporate human rights responsibility.

The concept of risk plays a central role in the Guiding Principles as the core element of human rights due diligence mechanism, which is introduced in order to help companies to discharge their corporate responsibility to respect human rights. I have found that the concept of risk is applied in two different but complementary ways. First, it is used in the meaning of business risk, i.e. operational, legal, reputational, financial and, finally economic risks. These are the risks, which flow from company's engagement in or association with human rights abuses. They represent risks to the company itself and, consequently to its shareholders. Second, and most important for the Guiding Principles, the concept of risk is used in the meaning of human rights risks, i.e. potential adverse impacts of companies on human rights of people. Human rights risks are not primarily risks to the company, but to its stakeholders.

The change in focus of risk assessment from the company and its shareholders to the stakeholders is the first important difference between business risks and human rights risks. It was crucial to emphasise this distinct logic of human rights risks assessment as opposed to traditional business risk assessment in order to direct the attention of corporate managers towards stakeholders and adverse impacts on their human rights. The human rights risk

assessment and management approach proposed by the Guiding Principles is not what is seen as the traditional and mainstream approach to corporate risk management, with the focus on business risks and shareholder value. Rather, human rights due diligence shifts the focus from risks to shareholders, to risks to all stakeholders, and this way, it broadens the notion of risk in business. Shifting the focus from shareholder risks to stakeholder risks is crucial for achieving the aim of the Guiding Principles, which is in reducing corporate human rights harm.

The second central difference between business risks and human rights risks lies at the technical level. A business risk is a product of two equally important elements, the likelihood of an event and its consequences. For human rights risk the severity of consequences for stakeholders is the prevailing factor, while likelihood can be used as guidance to prioritise which urgent human rights risks should be addressed first. The more severe and irremediable the adverse human rights impacts are, the more urgent it is for the company to address them.

Although the difference between business risks and human rights risks is strongly emphasised, there are important links between the two levels of risk. Human rights violations by companies are often interconnected with their business risks, and it is increasingly acknowledged that adverse human rights impacts negatively affect the company's bottom line and its ability to maximise shareholder value. By using a number of empirical cases, I have discussed how human rights risks have led to operational, legal, reputational, and financial risks; and how human rights risks can ultimately lead to material losses for companies. The traditional shareholder interest in earning a profit on the investment and the stakeholders' interest in terms of the respect for their human rights, in principle are not conflicting interests, at least not in the long run. Rather, corporate human rights responsibility may help to enhance shareholder value because human rights due diligence, when done properly and in good faith, is likely to reduce human rights risks and impacts, and the business risks that are linked to them.

Answering a research question often poses a number of new ones. During this study I identified some challenges of the risk-based approach to corporate human rights responsibility, which need to be addressed the follow-up mandate of the UN Working Group in order to make implementation of the Guiding Principles more consistent and effective. First, the shift towards a broader stakeholder approach offers a number of problems. Among other issues, there is the question of how to identify all relevant stakeholders and their legitimate representatives; and how to prioritise legitimate stakeholder demands when they are in conflict with each other.

Second, in the Guiding Principles and the Interpretive Guide the notion of human rights risks is defined and briefly explained, but the methodology of human rights risk assessment is not yet established. Risk is an ambiguous concept when it comes to complex societal contexts, and risk assessment is often a difficult subjective exercise. The effectiveness in detecting potential human rights impacts largely depends on the amount and quality of available information, the qualification of the assessor and on awareness of his or her biases. During the field study, I asked a number of human rights and business experts how human rights risk assessment should be done in practice. I did not get any clear answers. After a year of work on the project I still cannot claim to know what the appropriate and effective methodology for human rights risk assessment is. The key actors promoting the Guiding Principles, the UN Working Group and the OHCHR secretariat, agree that there is a need to further clarify how human rights risks should be assessed and provide a more detailed guidance in order to ensure the effectiveness of human rights due diligence. It is an important task of the Working Group to facilitate convergence of the interpretations of the Guiding Principles and set directions for the process of implementation. However, a major challenge for the Working Group of five experts is the limited time and resources and the tremendous amount of work, which needs to be done across all continents and business sectors.

Developing appropriate human rights risk assessment methodology might be a time-consuming process, as every step of the Working Group has to be based on research of existing practices and consultations with all relevant stakeholders. In the meantime a number of TNCs are already implementing human rights due diligence, for instance Shell, Unilever, Norsk Hydro and the Telenor Group, to name only a few. A standard methodology for human rights risk assessment would not only help to ensure the quality and effectiveness of the internal risk assessment processes in companies, but also make the goal of convergence in interpretations and practices more attainable. It is true that for human rights due diligence one size does not fit all, and corporate managers are the ones who know their companies best to say what works and what does not. However, a basic guidance on how to assess and prioritise human rights risks would be useful, especially for SMEs, which rarely have in-house human rights expertise or resources to develop a proper methodology on their own.

Despite all the remaining challenges, the risk-based approach to corporate human rights responsibility has helped to move the business and human rights agenda forward. The primary reason for adopting the risk-based approach to corporate human rights responsibility in the Guiding Principles was the consideration of it being comprehensible and relevant for companies. Using concepts familiar to business in conjunction with mechanism of risk assessment and management, the idea was to make the Guiding Principles appealing to the business community. I have argued that the risk-based approach is central to the overarching principled pragmatism approach of John Ruggie, which implies striking a balance between effectiveness of the Guiding Principles in protecting human rights from corporate related harm, and feasibility of terms of getting all relevant actors, including business, governments and civil society to support and implement the Guiding Principles. Effectiveness of the Guiding Principles depends on the further steps by the Working Group and all relevant stakeholders in disseminating and implementing the Guiding Principles in practice, and in solving the remaining challenges, including those, which were identified in this study. Adoption of

the risk-based approach was as a necessary pragmatic step to get business stakeholders to accept corporate responsibility to respect human rights. Although it should be acknowledged that other important factors, such as the legally non-binding character of the Guiding Principles and the clever balance between states' duty to protect and corporate responsibility to respect, also were crucial for achieving the consensus among all stakeholders.

In the Guiding Principles, the risk-based approach replaces a normative approach. The risk-based approach is founded on the notion of self-interest of business in conducting risk management in order to avoid costs of adverse human rights impacts. The Guiding Principles do not explicitly address the ethical dimension of corporate social responsibility, which would emphasise that to respect human rights is 'the right thing to do' for companies. This marks a transition from moral arguments, which characterised the previous work of the UN on business and human rights norm, in particular the UN Draft Norms, to an argument based on materiality. The links between business risks and human rights risks constitute the basis for the business case for human rights due diligence. Through the measures proposed to enhance accountability and to raise social expectations for corporate conduct with regard to human rights, the business case for human rights due diligence is sought to be reinforced and made relevant also for those companies, which today do not see or choose to ignore the links.

The overarching principled pragmatism approach of John Ruggie is a sophisticated strategy for getting business to adopt human rights due diligence based on self-interest, and simultaneously driving a global socialisation process to make not only companies, but also governments, internalise international human rights principles. If successful, such a socialisation process coupled with concrete guidance and practical tools, may over time transform the UN Guiding Principles from a practice standard to the standard practice of corporate human rights responsibility.

## Appendices

### Appendix 1: List of Data

#### Document Review

Year	Reports	Addenda	Consultations	Surveys	Resolutions/ Mandates	Tools
2005			<a href="#">Report of the United Nations High Commissioner for Human Rights on the sectorial consultation entitled “Human rights and the extractive industry”, Geneva, 10-11 Nov 2005 (E/CN.4/2006/92, Dec 19, 2005)</a>		<a href="#">UN Commission on Human Rights, Human Rights Resolution 2005/69, 20 Apr 2005</a>	

2006	<a href="#">John Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/2006/97 (2006).</a>					
2007	<a href="#">Business and human rights: mapping international standards of responsibility and accountability for corporate acts. Doc A/HRC/4/35/Corr.1, 13 March 2007</a>	<a href="#">Addendum4: Business recognition of human rights: Global patterns, regional and sectorial variations. Doc A/HRC/4/35/Add.4 8 February 2007.</a>	<a href="#">Report of the United Nations High Commissioner on Human Rights on the sectorial consultation entitled “Human rights and the financial sector” [PDF], Geneva, 16 Feb 2007. Doc A/HRC/4/99, 6 March 2007.</a>	<a href="#">Human rights policies and management practices: results from questionnaire surveys of Governments and the Fortune Global 500 firms, Doc A/HRC/4/35/Add.3 , 28 February 2007.</a>		<a href="#">Embedding Human Rights in Business Practice II, A joint publication of the United Nations Global Compact and the OHCHR, 2007</a>



	<a href="#">Companion Report: "Human rights impact assessments - resolving key methodological questions" Doc A/HRC/4/74, 5 February 2007.</a>		<a href="#">Summary of Multi-Stakeholder Consultations: Corporate responsibility to respect human rights, summary report on consultation in Geneva, 4-5 Dec 2007 (http://www.reports-and-materials.org/Ruggie-Geneva-4-5-Dec-2007.pdf)</a>	<a href="#">Business recognition of human rights: Global patterns, regional and sectorial variations. Doc A/HRC/4/35/Add. 4, 8 February 2007.</a>		
<b>2008</b>	<a href="#">"Protect, Respect and Remedy: a Framework for Business and Human Rights". Doc A/HRC/8/5, 7 April 2008.</a>	<a href="#">Addendum: Summary of five multi-stakeholder consultations. Doc. A/HRC/8/5, 7 April 2008.</a>			<a href="#">UN Human Rights Council, Res 8/7: Mandate of the Special Representative of the Secretary-General (http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf)</a>	<a href="#">Human Rights Translated - A Business reference guide, A joint publication by UN Global Compact Office.</a>

						<a href="#">Castan Centre for Human Rights Law, Office of the UN High Commissioner for Human Rights and International Business Leaders Forum, 2008</a>
	<a href="#">Companion report: "Clarifying the Concepts of "Sphere of influence" and "Complicity" Doc A/HRC/8/16, 15 May 2008.</a>	<a href="#">Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse. Doc A/HRC/8/5/Add.2, 23 May 2008.</a>				

2009	<a href="#">"Business and human rights: Towards operationalizing the "Protect, Respect and Remedy" framework "Doc A/HRC/11/13, 22 April 2009.</a>		<a href="#">Consultation on operationalizing the framework for business and human rights presented by the Special Representative organised by Office of the UN High Commissioner for Human Rights (OHCHR) - Geneva, 5-6 Oct 2009</a> <a href="http://www.business-humanrights.org/Spec"> (http://www.business-humanrights.org/Spec)</a>			<a href="#">A Guide for Integrating Human Rights into Business Management, 2nd Edition, OHCHR/UN Global Compact/BLIHR, 2009</a>
2010	<a href="#">Further steps toward the operationalization of the 'protect, respect and remedy' framework. Doc A/HRC/14/27, 9 Apr 2010</a>		<a href="#">Consultation with Business Stakeholders, Paris, France, 5 Oct 2010</a> <a href="http://www.business-humanrights.org/media/documents/report-from-"> (http://www.business-humanrights.org/media/documents/report-from-</a>			<a href="#">OHCHR and Global Compact Human Rights and Business Learning Tool, UN OHCHR/UN Global Compact Office, 2010</a>

			<a href="#"><u>ruggie-business-consultation-paris-5-oct-2010.pdf</u></a>			<a href="http://human-rights-and-business-learning-tool.unglobalcompact.org/"><u>(http://human-rights-and-business-learning-tool.unglobalcompact.org/)</u></a>
			<a href="#"><u>Consultation with UN Member States, Geneva, Switzerland, Oct 2010 (http://www.business-humanrights.org/media/documents/report-from-ruggie-govts-consultation-geneva-6-oct-2010.pdf)</u></a>			
			<a href="#"><u>Consultation with Civil Society, Geneva, Switzerland, 1-12 Oct 2010</u></a>			

			<a href="http://www.business-humanrights.org/media/documents/report-from-ruggie-civil-society-consultation-geneva-11-12-oct-2010.pdf">http://www.business-humanrights.org/media/documents/report-from-ruggie-civil-society-consultation-geneva-11-12-oct-2010.pdf</a>			
			<a href="#">Expert Meeting: Exploring Human Rights Due Diligence, New York, USA, April 30 2010</a> <a href="http://www.reports-and-materials.org/Ruggie-summary-of-corporate-and-external-counsel-meeting-30-Apr-2010.pdf">http://www.reports-and-materials.org/Ruggie-summary-of-corporate-and-external-counsel-meeting-30-Apr-2010.pdf</a>			

2011	<a href="#"><u>Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework. Doc A/HRC/17/31, 16 Jun 2011.</u></a>	<a href="#"><u>Piloting principles for effective company/stakeholder grievance mechanisms: A report of lessons learned. Doc A/HRC/17/31/Add.1, 24 May 2011.</u></a>			<a href="#"><u>UN Human Rights Council Resolution 17/4, Doc A/HRC/RES/17/4, 6 Jul 2011.</u></a>	<a href="#"><u>Human Rights and Business Dilemmas Forum, UN Global Compact/Maplecroft, 2011 (<a href="http://human-rights.unglobalcompact.org/">http://human-rights.unglobalcompact.org/</a>)</u></a>
						The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (OHCHR, Advance Unedited Version, November 2011)

2012	Conclusions from the First Session of the Working Group on human rights and transnational corporations and other business enterprises, (received by e-mail), 8 Feb 2012.	<a href="http://www.ohchr.org/EN/Issues/Business/Pages/WorkingMethods.aspx">UN Working Group: Methods of Work (http://www.ohchr.org/EN/Issues/Business/Pages/WorkingMethods.aspx).</a>				
	<a href="http://www.ohchr.org/EN/NewsEvents/Pages/WorkingGroupAdoptsWorkingMethods.aspx">Communication: Working Group Adopts Working Methods, 9 Feb 2012 (http://www.ohchr.org/EN/NewsEvents/Pages/WorkingGroupAdoptsWorkingMethods.aspx).</a>					

<a href="#"><u>Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/20/29, 10 April 2012.</u></a>						
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## Interviews

Date	Location	Organisation	Position	Name	Contact	Bibliography
01.12.2011	Geneva, Switzerland	Office of the UN High Commissioner for Human Rights (OHCHR)	Associate Expert, Human Rights and Business	Anonymous	-	OHCHR (2011b)
06.01.2011	Oslo, Norway	Det Norske Veritas	Risk Classification Manager	Anonymous	-	DNV (2012)
23.02.2012	Copenhagen, Denmark	UN Working Group on human rights and transnational corporations and other business enterprises	Independent Expert, Chair of the 2 first sessions of the Working Group	Margaret Jungk	<a href="mailto:wg-business@ohchr.org">wg-business@ohchr.org</a> (Secretariat of the OHCHR)	Jungk (2012)
23.02.2012	Copenhagen, Denmark	Human Rights and Business Department, Danish Institute for Human	Human Rights Risk Analyst	Dirk Hoffmann	<a href="mailto:diho@humanrights.dk">diho@humanrights.dk</a>	Hoffmann (2012)

		Rights (National Human Rights Institution)				
05.03.2012	Geneva, Switzerland	Office of the UN High Commissioner for Human Rights (OHCHR)	Adviser on Business and Human Rights	Lene Wendland	<a href="mailto:lwendland@ohchr.org">lwendland@ohchr.org</a>	Wendland (2012)

### Observation

Date	Location	Organisation	Procedure	Type of Meeting
20.01.2012	Geneva, Switzerland	UN Human Rights Council	UN Working Group on human rights and transnational corporations and other business enterprises	Session of the Working Group (January 16-20, 2012), Exchange with Stakeholders (January 20, 2012, 10:00)

## **Appendix 2: Interview Guide (samples)**

### **Questions to Lene Wendland, adviser on business and human rights, Office of the United Nations High Commissioner for Human Rights.**

1. How did the concept of risk emerge during the Ruggie-mandate?
2. What is specific for the concept of risk when applied to human rights?
3. Have you experienced any disagreements among stakeholders on the meaning and use of the concept of risk in the Framework and Guiding Principles?
4. What risk methodology is appropriate for human rights risks of companies?
5. What existing standards and initiatives for human rights risk assessment and management do you see as most relevant for further operationalisation of due diligence?
6. Is there a potential for creating more coherence in human rights risk assessment tools? Avoid fragmentation.
7. How important is it to have a common human rights risks assessment methodology? Is it possible to define one?
8. What are the potentials of the focus on risk assessment and management?
9. What are the main challenges?
10. How much focus on risk is there in the ongoing work of the Working Group?

### **Questions to Margaret Jungk, chair of the UN Working Group on business and human rights; director of the Human Rights and Business Department, Danish Institute for Human Rights:**

1. What does the concept of risk mean for you?
2. In your opinion, what is the role of risk in the UN Guiding Principles?
3. What place do you think risk will have in the work of the Working Group?

4. What are the main challenges with the concept of risk when applied to human rights and business?
5. One important task for the Working Group is to make the Guiding Principles compelling for businesses. What do you think are the main potentials and challenges in this regard?
6. One of the main priorities of the Working Group is to assist stakeholders in effective implementation of the Guiding Principles. What constitutes an effective implementation?
7. How important is it to have a sound and coherent methodology for corporate human rights responsibility? Why?
8. Is one methodology that is applicable to all sectors and all types of companies feasible?
9. Taking into consideration the early phase of the mandate, what in your opinion could become the core elements of a sound methodology for corporate human rights responsibility?
10. In the Guiding Principles risk assessment and management seems to be at the core of Human Rights Due Diligence, however, approaches to risk assessment and management are numerous and highly diverse. What implications do you think this could have for effective implementation of the Guiding Principles at the company level?
11. How important is sound risk assessment methodology?
12. The European Commission, in a joint project with the Institute for Human Rights and Business and the Shift centre, will develop sector-specific guidance on corporate responsibility to respect human rights for three sectors, based on the UN Guiding Principles. How does this work relate to the UN Working Group? How could this project affect the goal of achieving coherence in approaches?
13. How do you think your experience at the Human Rights and Business Department of the Danish Institute for Human Rights could contribute to the work of the UN Working Group?
14. Will the UN Working Group cooperate with the Department?

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